



Australian Government
Attorney-General's Department
Criminal Justice Division

The Senate Standing Committee on Legal and Constitutional Affairs
Inquiry into the Criminal Code Amendment (Misrepresentation of Age to a Minor)
Bill 2013

Australian Government Attorney-General's Department submission

April 2013

Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Senate Standing Committee on Legal and Constitutional Affairs with this submission as part of the Committee's inquiry into the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013 (the Bill).
2. The Bill was introduced as a private senator's bill into the Senate by Senator Nick Xenophon on 28 February 2013. Schedule 1 of the Bill seeks to amend the *Criminal Code Act 1995* (Cth) (the Criminal Code) to make it a criminal offence for a person over 18 years of age to use a carriage service with the intention of misrepresenting their age to a person they reasonably believe to be under 18 years of age, for the purpose of encouraging a physical meeting or with the intention of committing an offence.
3. This submission focuses on the amendments contained in Schedule 1 of the Bill, in particular the offences created by that Schedule relating to misrepresenting age to a person under 18 years of age.
4. This submission was prepared in consultation with the Australian Federal Police and Commonwealth Director of Public Prosecutions.

Overview of existing Commonwealth offences

5. The Criminal Code contains a number of offences aimed at protecting children online. While Commonwealth legislation does not directly criminalise misrepresenting one's age to a child online, there are a number of existing offences in the Criminal Code which criminalise online communications with children where there is evidence of intention to cause harm to the child.
6. 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 (procuring), or making it easier to procure the recipient to engage in sexual activity (grooming), with the sender or another person. These offences are punishable by a maximum penalty of 15 years imprisonment and 12 years imprisonment respectively.
7. Online communications with a child with the intention of committing any other kind of serious offence against them would be captured by the existing 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). A person who is found guilty of this offence would be subject to the maximum penalty applicable to the specific offence that the person intended to commit. For example, a person who built a relationship with a child online with the intention of murdering the child would be subject to the penalty applicable to the offence of murder in the relevant jurisdiction.
8. The Commonwealth's child sex-related offences were strengthened in March 2010 through the passage of the Crimes Legislation Amendment (Sexual Offences Against Children Act 2010 (the Sexual Offences Against Children Act). The Sexual Offences Against Children Act contained a range of measures targeting child sexual exploitation, including by:
 - enhancing existing offence regimes for child sex tourism and online child pornography, including by increasing existing penalties
 - introducing new offences for using a carriage service for indecent communications or sexual activity with a child

- introducing a scheme for the forfeiture of online child pornography and child abuse material
- introducing a new suite of child sex-related postal service offences, and
- introducing new offences of dealing in child pornography and child abuse material overseas.

9. The measures were designed to ensure that child sex-related offences in areas of Commonwealth responsibility remain comprehensive and able to deal with contemporary forms of offending. Accordingly, the amendments took into account a range of factors including the need to remain responsive to emerging trends in the use of technology to sexually exploit children, law enforcement agencies' operational experience with existing offences and best practice domestically and internationally in legislating to combat child sexual exploitation. The reforms were also informed by submissions to a consultation paper, which was released to the public, including relevant State and Territory agencies and non-government organisations, in October 2009.

Overview of offences in the Bill

10. The Bill would amend the Criminal Code to create two new criminal offences relating to online communications with children.

11. The first, contained in proposed subsection 474.40(1), would make it an offence for a person over 18 years of age (the sender) to use a carriage service to communicate with a person they believe to be under the age of 18 years (the recipient) with the intention of misrepresenting the sender's age to the recipient for the purpose of encouraging the recipient to physically meet with the sender or any other person.

12. The second, contained in proposed subsection 474.40(2), would make it an offence for a person over 18 years of age (the sender) to use a carriage service to communicate with a person they believe to be under the age of 18 years (the recipient) with the intention of misrepresenting the sender's age to the recipient with the intention of committing an offence, other than an offence under proposed section 474.40.

13. Schedule 1 of the Bill also contains a number of evidentiary provisions (proposed section 474.41) and specific defences (proposed section 474.42). These appear to be modelled on sections 474.28 and 474.29 of the Criminal Code, which relate to the existing online child sex-related offences.

Comments on the offences proposed by the Bill

14. The Attorney-General's Department notes that while there are a number of similarities between the offences proposed by the Bill and existing offences in the Criminal Code, the Bill proposes a number of departures from the Commonwealth criminal law policy. As currently drafted, the Bill may also present a number of challenges in terms of prosecuting alleged offenders. These issues are discussed in detail below.

General comments on proposed subsections 474.40(1) and 474.40(2)

15. In relation to both offences proposed by the Bill, the Attorney-General's Department notes the following issues relating to the scope of proposed subsections 474.40(1) and 474.40(2).

16. Under paragraph (b) of each subsection, a person commits an offence if they communicate with a child online with the intention of misrepresenting their age (emphasis added). As currently drafted, the intention of misrepresenting age is a fault element rather than a physical element. This means that the sender need only have an intention to misrepresent their age to a child online, an actual misrepresentation is not required. This results in an offence with very broad application. It may be more appropriate that the offence require an actual misrepresentation of age rather than just an intention. This would be consistent

with the explanatory memorandum for the Bill, which suggests that an actual misrepresentation of age is required.

17. The Attorney-General's Department also notes that both of the proposed offences are directed at communications with a person the sender believes to be less than 18 years of age (emphasis added). This is inconsistent with existing offences in the Criminal Code directed towards online communications with children (in particular the existing grooming and procuring offences at 474.26 and 474.27), which are directed at communications with a person under the age of 16 years, and the age of consent to sexual activity in all Australian jurisdictions, which varies between 16 and 17 years of age. 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.

18. The anomaly between the age of consent and the scope of offences proposed by this Bill, in particular subsection 474.40(1), could result in persons committing an offence where they misrepresent their age to a young person, even if any consensual sexual activity engaged in between that person and the person under 18 years of age would not otherwise be a crime. For example, a 19 year old saying that 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.

Comments on proposed subsection 474.40(1)

19. In addition to the general issues discussed above, the Attorney-General's Department also notes the following specific issues with proposed subsection 474.40(1) of the Bill.

20. As outlined at paragraph 11 above, proposed subsection 474.40(1) makes it an offence for an adult to use a carriage service to communicate with a person under 18 years of age with the intention of misrepresenting their age for the purpose of encouraging a physical meeting. The Attorney-General's Department notes that the conduct covered by this subsection may, in many circumstances, be criminalised by the existing Criminal Code offences outlined above. The Department argues that the Criminal Code criminalises appropriately serious conduct, whereas the proposed new offence would be very broad in application and would capture conduct that is innocent and not warranting of criminal sanctions.

21. In particular, the existing online grooming and procuring 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 that physical meeting. The existing grooming and procuring offences therefore criminalise similar conduct to that covered by proposed subsection 474.40(1), noting that proposed subsection 474.40(1) is not limited to situations where there is an intention to engage in sexual activity with a child.

22. It is possible that by requiring an intention to encourage a physical meeting only, this offence may be easier to investigate and prosecute than existing grooming and procuring offences which require evidence of sexual intent, allowing law enforcement agencies to intervene during the preparatory stage of an offence before proof of sexual or other illicit intention is apparent. Despite this, the Attorney-General's Department is concerned that proposed subsection 474.40(1) appears to criminalise conduct which may not be harmful in itself, rendering the proposed offence too wide to capture actual criminal activity.

23. 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. For example, under section 144.1 of the Criminal Code, a person commits an offence if they make a false document with the intention that they or another person will use it to dishonestly induce a Commonwealth public official to accept it as genuine in order to dishonestly obtain a gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty or function (emphasis added). As noted in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, a 'key characteristic of a crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame'.¹

24. Criminalising lying for the sole purpose of encouraging a physical meeting with a child arguably does not attract this additional element of repugnance. Lying about one's age occurs in many social situations, including on the internet and social networking sites such as Facebook. There are many reasons why people may lie about their age, and it is conceivable that a person over 18, having lied about their age, may meet a young person without any ill intentions. For example, a person organising a birthday celebration may send an email to a co-worker or family member who is under 18, claiming to be far younger than they actually are as a form of humour. In this regard, it is particularly relevant that the Bill does not distinguish between misrepresenting one's age by a matter of days, months or years, or whether a person who has misrepresented their age by overstating it should also be guilty of an offence.

25. The Attorney-General's Department also questions the utility of enacting a criminal offence targeted specifically at one form of misrepresentation. Although the Department recognises the specific motivations behind the Bill, it is not clear how misrepresentation of age differs from other misrepresentations which may be used to encourage physical meetings with children (or other vulnerable persons), such as misrepresentation of gender, profession or physical appearance.

Comments on proposed subsection 474.40(2)

26. As outlined at paragraph 12 above, proposed subsection 474.40(2) makes it an offence for an adult to use a carriage service to communicate with a child with the intention of misrepresenting their age with the intention of committing an offence. Like proposed subsection 474.40(1), the conduct covered by the offence proposed by subsection 474.40(2) appears to be criminalised by existing Criminal Code offences outlined above.

27. In particular, the offence of using a telecommunications network with the intention of committing a serious Commonwealth, State or Territory offence (section 474.14 of the Criminal Code) would clearly criminalise similar conduct to that covered by the proposed subsection 474.40(2). Unlike subsection 474.40(2) however, the existing offence in section 474.14 of the Criminal Code does not require proof that the sender was over 18 years of age, that the recipient was someone the sender believed to be less than 18 years of age and/or that the sender intended to misrepresent their age to the recipient. Accordingly, the existing offence may be less onerous to prove than that proposed in the Bill.

28. In addition to these evidentiary issues, the proposed offence outlined in subsection 474.40(2) raises a number of other issues in terms of its scope. In particular, there is no clarifying information included as to whether the term 'offence' refers to a Commonwealth, State or Territory offence or a serious or other offence. Absent this information, it is possible that this provision could apply to an intention to commit any offence, with the consequence that a person charged with this offence could face a greater penalty than the offence he or she intended to commit. It is also unclear what fault element would apply to this element. The Attorney-General's Department notes that absolute liability is often applied to such elements so that the prosecution is not required to prove that the defendant knew that their intended conduct was an offence (for example, see existing subsection 474.14(4) of the Criminal Code).

¹ Commonwealth Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 2011, <<http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>>.

Conclusion

29. The Carly Ryan case is truly tragic and the Attorney-General's Department shares Senator Xenophon's concerns about the safety of children online.

30. The Criminal Code already criminalises online communications with children where there is evidence of an intention to engage in sexual activity with a child or otherwise cause harm to the child. While the offences proposed in the current Bill may criminalise a broader range of conduct than that already covered by the Criminal Code, the Attorney-General's Department considers that this goes beyond the accepted limits of criminal responsibility, particularly in relation to proposed subsection 474.40(1).