

To: Legal and Constitutional Affairs Legislation Committee

Inquiry into the Criminal Code Amendment (Protecting Minors Online) Bill 2017

Dear Sir / Madam

Thank you for inviting me to make some brief comments on the Criminal Code Amendment (Protecting Minors Online) Bill 2017.

I am a legal academic based at the University of Canberra and currently on sabbatical as a TILT Fellow at the Tilburg Institute for Law, Technology and Society in the Netherlands. I am the author of *Cybercrime: Legislation, Cases and Commentary* (Lexis Nexis 2015) as well as numerous cybercrime articles, and contributed the Australian country report to the recently published *Legal Aspects of Sweetie 2.0* (October 2016) which is a comparative study of the use of advanced online techniques in detection of child predators, particularly using a chatbot called "Sweetie" posing as a child in order to gather information on webcam-based sexual offending.

As a general comment, Australian legislation including Parts 10.6 and 10.7 of the *Criminal Code Act 1995* (Cth) provides a modern and extensive array of offences that criminalise online conduct involving harmful consequences and intentions, including preparatory conduct. Most significantly, the Code offences include:

474.14 Using a telecommunications network with intention to commit a serious offence

474.15 Using a carriage service to make a threat

474.17 Using a carriage service to menace, harass or cause offence

474.19 Using a carriage service for child pornography material

474.22 Using a carriage service for child abuse material

474.25A Using a carriage service for sexual activity with person under 16 years of age

474.26 Using a carriage service to procure persons under 16 years of age

474.27 Using a carriage service to "groom" persons under 16 years of age

474.27A Using a carriage service to transmit indecent communication to person under 16 years of age

These offences are used reasonably frequently to prosecute online offenders seeking to exploit or harm children and other victims. However, they are relatively recent and their precise scope is not always clear in the absence of judicial consideration, so that it may be that there are still gaps in the coverage of the Code in relation to online abuse. This is what motivates the introduction of a new offence through the Criminal Code Amendment (Protecting Minors Online) Bill 2017, namely 474.25C.

New section 474.25C

This section creates a new offence of using a carriage service (e.g. telephone or Internet) to prepare or plan any of three further acts against a person under 16 years of age:

- (i) causing harm;
- (ii) engaging in sexual activity; and
- (iii) procuring for sexual activity.

Notably, these further acts may already be criminal conduct under other provisions, but 474.25C takes a precautionary approach by criminalising the preparatory or planning stages of online activity aimed at harming or exploiting children. In this, it is in line with other offences such as the procuring and grooming offences in 474.26 and 474.27, which do not require that actual sexual contact with a child occur in order for the offence to be committed. Indeed, no actual child need be targeted, as the offences are deliberately framed so as to allow adults such as police officers to pose as children online in order to detect and identify child predators.¹

I note that the development of this Bill is in large measure a response to the tragic online victimisation and homicide of South Australian teenager Carly Ryan, and I take the opportunity to commend the work of the Carly Ryan Foundation over the last decade in bringing attention to the dangers of online child exploitation. However, I would make a number of more technical observations about the proposed new section's interaction with other provisions and its drafting, mainly in order to improve its clarity.

Overlap with other provisions

Existing 474.14 and 474.17 already criminalise a wide range of misuse of social media etc. to harass, threaten, target for extortion, robbery assault or homicide, any victim. New 474.25C perhaps adds a wider scope of 'harm' into the mix, as e.g. the 474.14 offence of facilitation is limited to 'serious' offences under Commonwealth, State, Territory or foreign laws, and may thus not extend to common assault or some minor property offences. Moreover, it may be that facilitation requires some closer connection between the online conduct and the intended act, whereas doing 'any act in preparation for doing, or planning to do' extends to a broader range of preparatory online conduct. The example provided, of misrepresenting age online, serves to illustrate that range.

Existing 474.25A, 474.26, 474.27 and 474.27A already cover procuring and some preparatory conduct such as grooming, as well as sexual activity (including purely online acts), directed at persons under 16. There is thus considerable overlap with sexual predation crimes in the Code, though again it may be that a broader range of preparatory conduct is captured by new 474.25C.

In summary, there is a large degree of overlap with existing offences, but the new 474.25C may help to extend the range of criminal liability to earlier preparatory acts which are not otherwise criminalised. However, attention needs to be directed to whether the wording is precise enough to capture only the intended misuse of carriage services. This directs attention to its drafting.

¹ See Gregor Urbas, 'Protecting Children From Online Predators: The Use of Covert Investigation Techniques by Law Enforcement' (2010) 26(4) *Journal of Contemporary Criminal Justice* 410.

Drafting issues

There are some points at which the meaning of the new offence provisions could be clearer:

- Whereas the age of the recipient of communications in offences such as 474.26, 474.27 and 474.27A is dealt with in a separate sub-paragraph, meaning that the associated fault element can be specified precisely, the wording of the composite ‘planning to [cause] harm to a person under 16 years of age’ and so on in para 474.25C(a) leaves it unclear whether the offence requires intention, knowledge, recklessness or any other fault element with respect to the age of the victim. Arguably, the default provision in s5.6 of the Code means that recklessness would be required for prosecution, as age of victim is a circumstance. This would make 474.25C quite different from those existing offences, as 474.28 provides for absolute liability with respect to age though providing for a statutory defence in in 474.29.
- Further, the inclusion in 474.26, 474.27 and 474.27A of the words ‘... or the sender believes to be, under 16 years of age’ as well as the provision on fictitious persons in 474.28(8) make clear that these offences can be committed even where no real child is being exposed to harm. Courts have repeatedly affirmed that this allows police to conduct covert “sting operations” which are quite lawful and proper in the protection of children against online predators.² By contrast, new 474.25C leaves it unclear whether a real child must be the object of the preparation or planning, and if so, whether this needs to be a particular child or an as yet unidentified child. For example, it would be unclear where the offence is committed by misrepresenting age to a police officer posing as a child. This could be clarified by adopting the same wording as existing procuring and grooming provisions, unless the intention is to limit the offence to only where real children are being put at risk. Consideration should be given to whether 474.28 and 474.29 should be amended to refer to 474.25C also, again depending on legislative intention.
- The example provided of misrepresenting age may give guidance to the courts, but does not form part of the offence (unlike some predecessor proposals). It is therefore perhaps not as clear as it might be what kinds of online activity are meant to be captured by 474.25C. At its broadest, simply using a carriage service in any way i.e. being online, may suffice if this is done in ‘planning to [cause] harm to a person under 16 years of age’ etc. This may indeed be the legislative intent, given that the words ‘any act’ appear in 474.25C(a), but in that case the example of age misrepresentation adds nothing to the interpretation of the offence, and may indeed cause some confusion. Consideration should be given to the utility of the example.

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Tilburg, 4 May 2017

² See, for example, the Australian Capital Territory Supreme Court cases of *R v Stubbs* [2009] ACTSC 63 (26 May 2009); and *R v Priest* [2011] ACTSC 18 (11 February 2011).