



THE LAW SOCIETY
OF SOUTH AUSTRALIA
THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

Postal Address: GPO Box 2066, Adelaide SA 5001 • DX 333, Adelaide
Phone: 08 8229 0200 • Fax: 08 8231 1929
Email: email@lawsociety.sa.asn.au • www.lawsociety.sa.asn.au
Level 10, Terrace Towers, 178 North Terrace, Adelaide SA 5000

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Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

and via email: legcon.sen@aph.gov.au

Dear Ms Dunstone

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

1. I refer to your letter of 22 January 2014 to the Immediate Past President, Mr White, inviting the Society to consider the inquiry into the *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013 (the 2014 Bill)*.
2. The 2014 Bill is a revised version of the earlier Bill introduced in the Senate on 26 February 2013 and which was considered by the Senate Committee in June 2013. On that occasion we understand that the Senate Legal and Constitutional Affairs Legislation Committee (**Senate Committee**) recommended that the Senate not pass the Bill.
3. The Senate Committee has specifically invited the Society to address the differences between the 2013 Bill and 2014 Bill and any relevant issues that arise as a result of these differences. Thank you for the opportunity to consider this matter.
4. The Society has previously made submissions regarding the 2010 Bill and 2013 Bill by letters respectively dated 19 February 2010 and 6 May 2013. For your information, further copies of our past submissions are enclosed. The 2014 Bill has been further considered by the Society's Criminal Law Committee and accordingly we provide the following comments for the consideration of the Senate Committee.

5. The Society opposes the 2014 Bill for largely the same reasons the 2013 Bill was opposed. We do not consider the differences between the two Bills to alter our overall position.

Differences Between the 2013 and 2014 Bills

6. The 2014 Bill is the same as the 2013 Bill save for two amendments. The first is the change of the age in paras 474.40(1)(d) and 474.40(2)(d) from under 18 to under 16 (meaning the offence relates to a recipient who is or is believed to be under 16). This amendment has the effect of ensuring that the age of the recipient in each jurisdiction is under the age of consent.
7. The amendment is also now consistent with the existing offences in the *Criminal Code* directed towards online communications with children (see esp ss 474.26 and 474.27).
8. The second amendment is the removal of the absolute liability provision in s 474.41(1) of the 2013 Bill. This makes the fault element for the sub-s 474.40(1) and (2) offences, where the recipient is under 16, recklessness as to that circumstance (or fact).
9. This means that to be guilty of the sub-s 474.40(1) and (2) offences where the recipient is under 16, the accused must be aware of a substantial risk that the recipient is under 16 and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk that the recipient may be under 16.
10. This amendment removes the potential injustice of exposing people to criminal liability in circumstances where they believed on reasonable grounds that the recipient was at or above the legal age.

Proposed Section 474.40(1)

11. The Society maintains its opposition to s 474.40(1) for essentially the same reasons the 2013 version was opposed as follows:
 - no misrepresentation is required;
 - 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
 - the existing offence provisions should be sufficient to cover the mischief of the Bill (refer our letter of 6 May 2013).

12. The Society's threshold objection to s 474.40(1) remains that the offence can be made out without the need to make a misrepresentation. We refer to our comments in our previous submission.
13. The Society otherwise repeats the same concern (it did of the 2013 Bill) that s 474.40(1) captures inherently non-criminal conduct. The offences are not limited to online chat forums and social media platforms 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.
14. Both versions of s 474.40(1) seek to criminalise an act which is potentially preparatory to the commission of an offence (typically sex or violence or both). Of course, as was observed in our previous submission, the misrepresentation may not be criminally motivated. The sender's intention to meet may be honourable.
15. Paragraph 474.40(1)(a) (and 474.40(2)(b)) requires only that the person uses the carriage service "*with the intention of misrepresenting his or her age*". In other words, a person who uses a carriage service with the intention of misrepresenting his or her age but makes no such representation is guilty of an offence (assuming the other criteria are also satisfied).
16. In our previous submission of 6 May 2013, we suggested this was too wide. We repeat that submission. If any conduct is to be criminalised in this Bill (which we oppose) it should be based on an *actual* misrepresentation as to age.
17. It is not unusual for Parliament to consider certain conduct inherently suspicious and thereby criminalise it, typically by the use of deeming type provisions. This would usually involve the implementation of a policy decision.
18. Whilst policy is, generally, the domain of the Government, there are times when policy and principles of fairness collide. Where this occurs it is, in our view, incumbent on the Society to comment. We now do so with particular reference to s 474.40(1)(d).
19. A key element of the s 474.40(1) offence is that:
 - A. the sender must believe the recipient is under 16; or
 - B. the recipient is under 16.

A. Sender Believes Recipient Under 16

20. One can readily accept a policy prohibiting conduct where it is reasonable to assume that the conduct is preparatory to the commission of an offence. For example, it would not be seen to be objectionable to criminalise conduct in circumstances where a 60 year old man misrepresented his age to be 15 years old with a view to meet a child he believes to be 14 years old.
21. In that case it is reasonable for the law to presume that the 60 year old is motivated by an intention to commit an offence. In those circumstances, such an offence is unlikely to be objectionable.
22. Importantly, in this example, the type of communication (eg, email, internet etc) is critical to the conduct. The 60 year old could not make such a misrepresentation without hiding behind a technological curtain.
23. There are other examples of age misrepresentations, however, that clearly should not be criminalised. For example:
 - An 18 year old misrepresenting his/her age as 17 to someone he/she believes to be 15 years old (in this example, the sender could be just over 12 months older than the recipient);
 - Any upwards misrepresentation of age (that is, misrepresenting age to be older than the true age).
24. In these examples, the misrepresentations could have been made in person. The fact they are made using a carriage service should not attract the attention of the law where the carriage service is not being used to masquerade an age.
25. The law would be brought into disrepute if two 18 year old friends misrepresented their age as 17 to people they believed to be 15, but only one committed a criminal offence because he or she did it over the phone whereas the other did it in person.
26. The same would apply where an “upwards” misrepresentation was made.

B. Recipient is Under 16

27. The removal of the absolute liability provision from the 2013 Bill puts that part of the offence requiring the recipient to be under 16 on a similar footing to the offence requiring belief the recipient is under 16. In the case of the former, as observed above, the sender will be guilty of the offence if he/she was reckless as to the fact the recipient was under 16.

28. It can be seen that the points made in paragraphs 22 – 25 above are also applicable to a s 474.40(2) offence where the recipient is under 16.

Section 474.40(2)

29. The Society opposes s 474.40(2) for essentially the same reasons as previously advised.
30. This section suffers from the same threshold problem as s 474.40(1).
31. Otherwise we believe the existing law covers this offending. We refer, in particular, to ss 474.14, 474.26 and 474.27 *Criminal Code*. We note that s 474.14(1)(a) may require an amendment to ensure it has broader application.
32. On the topic of existing offences, we also draw attention to the extended liability provisions in Part 2.4 of the *Criminal Code* which apply to existing criminal offences. Typically, attempts, conspiracy and incitement to commit offences will also be available to cover the mischief of the Bill.

Subsection 474.41(2), (3) and (5)

33. These subsections have not been amended. Our comments in opposition (with respect to the equivalent subsections 474.41(3), (4) and (6)) apply here.

Section 474.42 – Statutory Defence

34. Section 474.42 is the statutory defence provision. It could be said that the existence of the provision overcomes the problem with the width of the Bill capturing non-criminal conduct. The Society would not accede to this proposition.
35. The difficulty with the statutory defence is that it necessarily means that criminal liability *prima facie* attaches. Even allowing for the facilitation of proof provision of s 474.41(1), we consider it unfair for *prima facie* criminal liability to attach for such a serious offence in circumstances where the width of the proposed offence provision will inevitably capture conduct which is not inherently criminal. The unfairness is compounded by requiring the accused person to bear the onus of disproving the offence.
36. In relation to s 474.42(1), there appears to be a typographical error – the age should be “under 16”.

37. In relation to s 474.42(2), the provision remains unchanged. The Society opposes it for the same reasons outlined in our previous submission.

I trust these comments are of assistance.

Yours sincerely

Morry Bailes
PRESIDENT