



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

February 2014

Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Senate Legal and Constitutional Affairs Legislation Committee with this supplementary 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 current Bill is a revised version of an earlier Bill which was introduced as a private senator's bill in the Senate by Senator Nick Xenophon on 26 February 2013 and was considered by the Committee in June 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 who is, or who they reasonably believe to be under 16 years of age, for the purpose of encouraging a physical meeting or with the intention of committing an offence.
3. The Attorney-General's Department made a submission to the Committee's inquiry into the earlier Bill on 22 April 2013 (the original submission). This supplementary submission focuses on the minor differences between the two bills and the issues that arise as a result of these differences.
4. Overall, the Attorney-General's Department stands by its position in the original submission. The Department is of the view that the current Bill, like the earlier Bill, is not necessary and is too broad in its application. The Department notes that this position is consistent with the findings of the Committee's report on the earlier Bill of June 2013.
5. This supplementary submission was prepared in consultation with the Australian Federal Police and the Commonwealth Director of Public Prosecutions.

Comments on the offences proposed by the revised Bill

6. The Attorney-General's Department notes that the revised Bill only addresses one of the comments which the Department made in its original submission.
7. Subsections 474.40(1)(d) and 474.40(2)(d) of the revised Bill are directed at communications with a person who is, or who the sender believes to be, less than 16 years of age, rather than 18 years of age as proposed in the earlier Bill. This position is consistent with existing offences in the Criminal Code dealing with online communications with children (in particular the existing grooming and procuring offences at section 474.26 and 474.27), which are directed at communications with a person under the age of 16 years. It is also consistent with the age of consent to sexual activity in all Australian jurisdictions, which varies between 16 and 17 years of age.
8. The Attorney-General's Department notes though, that this amendment has not been made to all relevant provisions of the revised Bill. In particular, section 474.42(1) provides a defence against section 474.40 if the defendant believed at the time that the communication was transmitted that the recipient was not *under 18 years of age*. This means that the revised Bill is not only inconsistent with existing defences in the Criminal Code (section 474.28(1)), but also with other sections of the Bill.
9. Irrespective of this minor amendment to the Bill, the Attorney-General's Department firmly believes that the Bill is unnecessary as the Criminal Code already criminalises appropriately serious conduct relating to the proposed offences. The revised Bill remains very broad in its application and, in many cases, would capture conduct that is innocent and not warranting of criminal sanctions. The

Department maintains that the Bill departs significantly from criminal law policy and may present challenges to those attempting to prosecute alleged offenders. Paragraphs 5-9 of the Department's original submission provides further information on this point.

Conclusion

10. As the Attorney-General's Department stated in the original submission, 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 (for example, sections 474.26, 474.27 and 474.14). 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).