



**Australian
Human Rights
Commission**

Inquiry into the Criminal Code

Amendment (Misrepresentation of

Age to a Minor) Bill 2013

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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1 Introduction

1. The Senate Standing Committee on Legal and Constitutional Affairs (the Committee) has invited the Australian Human Rights Commission (the Commission) to provide a submission to its Inquiry into the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013.
2. The private senator's bill, introduced by Senator Xenophon, seeks to amend the *Criminal Code Act 1995* to make it an offence for a person who is over 18 years of age to misrepresent their age to a person that they reasonably believe to be under 16 years of age for the purposes of encouraging a physical meeting, or with the intent of committing an offence.
3. The Committee has asked the Commission to specifically address the differences between a bill that was considered by the Committee in June 2013 and a modified bill that was provided to the Committee for consideration in December 2013. It also asks that the Commission consider relevant issues that arise as a result of these differences.

The Commission shares Senator Xenophon's concerns about the safety of children online and considers that misrepresentation of age in the context of online grooming behaviour towards children is a serious contemporary issue. However, the Commission believes that preventative measures do not have to be the sole result of legislation and/or new criminal offences; especially where this results in duplication and is overly broad in its capture.

4. In preparing this submission, the Commission acknowledges the tragic circumstances relating to the death of Carly Ryan in South Australia.

2 Children's rights in the context of protecting minors from predatory online behaviour by adults

5. As a signatory to the United Nations *Convention on the Rights of the Child* (CRC), Australia has a legal obligation under international law to protect children.
6. Article 19 of the CRC provides that:

(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

3 Differences between the revised bill and the June 2013 bill

7. There are three differences between the two bills.
8. First, the age relating to a minor stipulated in the revised bill has been reduced from 18 years of age to 16 years of age. Reducing the recipient age from under 18 years to under 16 years provides consistency with the age of consent laws across Australian jurisdictions. It also provides consistency with subsections 474.26 and 474.27 of the *Criminal Code* (Cth), which prohibit the use of a carriage service to 'groom' or procure a person under the age of 16 to engage in sexual activity.

This amendment addresses the concerns that were raised in seven of the nine submissions provided to the inquiry on the previous bill; including the Law Society of South Australia, Law Society of Western Australia, Law Council of Australia, New South Wales Council for Civil Liberties, National Children's and Youth Law Centre, ACT Government and the federal Attorney General's Department.

In the Report prepared by the Committee in relation to the previous bill, the Committee indicated that it was aware that Senator Xenophon intended to make this amendment to the bill. However, the Committee concluded that 'it does not resolve the Committee's primary concerns that the bill is not necessary and is too broad in its capture'. The Commission agrees with this view.

9. Second, section 474.41 (1) relating to absolute liability has been removed in the revised bill. This section provided that:

For the purposes of an offence against section 474.40, absolute liability applies to the physical element of the circumstance of the offence that the recipient is someone who is under 18 years of age.

While the Commission considers that there may be some circumstances where imposing absolute liability is appropriate, it agrees that it is not appropriate in the context of this bill. Article 14(2) of the *International Covenant on Civil and Political Rights* provides:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

10. Third, the word 'jury' has been replaced with 'trier of fact' in section 474.42 (2) of the revised bill. The Commission attributes this to being a drafting oversight in the previous bill.

4 Relevant issues that arise as a result of these differences

11. Whilst the amendments address some of the concerns about the previous bill, they fail to address other fundamental concerns. Specifically they do not address the duplication of existing offences in the Criminal Code and the bill's formulation of offences in the proposed new section 474.40 (1), including criminalising behaviour which is not inherently criminal.

These other concerns were raised in the majority of other submissions to the inquiry into the previous bill.

The Committee accepted the validity of the concerns relating to the duplication of existing offences in the Criminal Code and the bill's formulation of offences in the proposed new section 474.40 (1), including criminalising behaviour which is not inherently criminal. The Committee indicated in its Report in June 2013 that it was aware of the proposed amendment to the bill in relation to reducing the age from 18 years to 16 years of age but did not consider the nature of the proposed amendment sufficient to warrant recommending support of the bill. The Commission concurs with the view of the Committee.

5 Recommendation

12. The Australian Human Rights Commission recommends that the Committee recommend to the Senate not to pass the bill.

6 Education and increasing public awareness

13. While the Commission recommends that the current bill not be passed, it also holds the view that the underlying motivation for Senator Xenophon proposing the bill should be addressed. Fundamentally, the object of the proposed bill is to protect minors from predatory online behaviour by adults. The safety of children online is a key advocacy area of the Commission. As stated previously, the Commission believes that preventative measures do not have to be the sole result of legislation and/or the creation of new criminal offences.
14. Education and increasing public awareness is an essential part of any preventative approach; including educating children about their right to be safe and protected from harm. Measures should include educating children and the public about existing laws and the serious penalties attached to these criminal offences. Research findings should also be used to educate and inform about the prevalence of particular risks and the specific contexts in which they arise. This type of knowledge can assist families and communities in early detection and intervention.
15. Current research conducted by the Australian Communications and Media Authority (ACMA) was released on Safer Internet Day (11 February 2014).¹ 23% of the parents involved in ACMA's research said that they were concerned about unwanted contact from strangers/grooming. The research involved 1,001 parents, selected as the main caregivers, 396 children aged eight to 11 years and 605 young people aged 12 to 17 years. The research found that:

Children and young people were most likely to turn to their parents first if they needed to enquire about a potential cybersafety issue, despite community perceptions and anecdotal evidence suggesting otherwise.
16. 78% of children and young people reported that their likely sources of cybersafety information sources would be parents or other trusted adults; 38% reported turning to a teacher; 31% reported turning to friends; 22% reported turning to friends; 18% reported turning to siblings; 8% got information from school

information sessions; 3% got information from school newsletters; 2% reported getting information from onsite advertisements that they used; 2% got information from television or radio.

These results show that the percentage of children and young people turning to their parents for assistance, while decreasing with age, was the most common response for each age group. ACMA suggests that this finding highlights the importance of reaching parents as a key target audience for cybersafety resources.

The research also indicated that 48% of parents became aware of cybersafety issues through news or current affair shows; 47% through friends and family; 46% through newsletters from their child's school; 32% through talking to their child; 27% through a government website; 21% through face to face information sessions through their child's school; 15% through online advertisements; 15% through something at their child's school; 9% through a cybersafety website; 8% through an internet service provider or telephone service; 3% through facebook; 2% through stories in magazines or newsletters and 11% indicated that they had not heard about cybersafety through any means.

Having this type of information is crucial in terms of appropriately targeting education and public awareness campaigns.

17. Future research should continue to elicit the views of children, young people and their parents about their concerns, attitudes, skills and knowledge in the cyberspace context. In addition, it is important to evaluate the effectiveness of the various educational and public awareness programs, including the filtering and other technologies used to minimise and control risks. This will help to make better informed choices as to what risks should be prioritised for education and intervention, what programs and methods will be most effective in combating those risks and how resources can be effectively targeted.
18. Fundamentally the object of the proposed bill is to protect minors from predatory online behaviour by adults.

¹ Australian Communications and Media Authority. Connected parents in the cybersafety age. June 2013. Snapshot February 2014.