

Senate Legal and Constitutional Affairs Legislation Committee

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

Written question on notice - Senator Wright

3 March 2014

To: Attorney-General's Department (the Department) and relevant agencies

1. Please outline the approach taken by the AFP and CDPP in criminal investigations where a suspected offender may be suffering from a mental impairment such as an intellectual disability. What processes or procedures are followed? Would the AFP or CDPP ever discontinue an investigation or prosecution on the basis that a suspect is clearly suffering from a mental impairment, or is that determination generally left to be resolved during the trial process?

Investigation of alleged offences by the AFP is a non-linear process with many and variable phases, depending on the nature of the investigation. Investigation includes an assessment of available evidence to develop an initial picture of the alleged illegal activities and potential criminality of the conduct. This is a continuous assessment and includes building an understanding of the alleged offenders physical capacity and mental capability, including a person's intent (where relevant) to commit the offence. The assessment is built on throughout an investigation and is considered in exercising the police's discretionary power to lay charges.

As the discretion to lay charges will be based on the assessment of the available evidence, a decision whether to lay charges or not due to mental impairment will be supported by information gathered during the investigation, such as expert opinion or objective facts. The existence and examination of an apparent mental impairment or intellectual disability may in some circumstances form a substantial part of the investigation.

The AFP provides substantial training to sworn police officers on conduct of investigations, including strategies on dealing with offenders suffering from a cognitive disability during an investigation. Legislative protections for example under Part IAA 'search, information gathering, arrest and related powers' and Part IC 'investigation of Commonwealth offences' of the *Crimes Act 1914*, ensure protection of people with a mental impairment or intellectual disability during use of such powers or during investigations.

The CDPP does not have an investigative function and can only prosecute when an investigative agency has compiled a brief of evidence and referred the matter to the CDPP for consideration. The CDPP then has discretion as to whether to commence a prosecution based on the brief of evidence.

The *Prosecution Policy of the Commonwealth*¹ outlines the relevant factors and considerations which are taken into account when prosecutors exercise their discretion. The Prosecution Policy also serves to inform the public and practitioners of the principles which guide the decisions made by the CDPP.

The Prosecution Policy provides that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured. The prosecutor should have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender.

With regard to mental impairment, section 7.3 of the *Criminal Code Act 1995* (Cth) provides that a person is not criminally responsible for an offence if the person was suffering from mental

¹ The Prosecution Policy is a public document that applies to all Commonwealth prosecutions. It can be accessed at <http://www.cdpp.gov.au/publications/prosecution-policy-of-the-commonwealth/>. The Prosecution Policy underpins all of the decisions made by the CDPP throughout the prosecution process and promotes consistency in decision making.

impairment that had the effect specified in that section. Prosecutors may exercise their discretion not to proceed in cases where the alleged offender was clearly suffering a mental impairment because it is likely the defendant would be able to rely on this defence to avoid a conviction.

Further, the Prosecution Policy provides that consideration is given to whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. The Prosecution Policy states that not all offences brought to the attention of the authorities must be prosecuted.

Factors listed in the Prosecution Policy as matters that may arise for consideration as to whether the public interest requires a prosecution include:

- Mitigating or aggravating circumstances impacting on the appropriateness or otherwise of the prosecution (paragraph 2.10(b)).
- The youth, age, intelligence, physical health, mental health or special vulnerability of the alleged offender, a witness or victim. (paragraph 2.10(c)).
- The alleged offender's antecedents and background.

If a decision is made to proceed with a prosecution, paragraph 7.2 of the Prosecution Policy provides that it is generally a matter for the defence to argue that the defendant is unfit to be tried.

2. Proposed new subsection 474.40(1) of the Bill in effect creates a strict liability offence, whereby the act of an individual encouraging a meeting with a minor using a carriage service incurs criminal liability if that individual intends to misrepresent (or actually misrepresents) their age to that minor at any stage during communications. This could be problematic in cases where an adult with, for example, an intellectual disability, misrepresents their age to a minor online and intends to meet with that minor, with benign rather than criminal intentions (such as forming friendships etc.).

a) If the Bill were to be passed, would the mental impairment defence in section 7.3 of the *Criminal Code Act 1995* be sufficient to protect individuals from conviction in such cases?

The defences in the *Criminal Code Act 1995* (Cth), including the mental impairment defence in section 7.3, have been carefully defined and apply automatically to all Commonwealth offences. The Bill would not require a separate offence-specific mental impairment defence. However, the question of whether a defence is successfully made out is ultimately a matter for the court.

b) Are there any other safeguards in place to avoid prosecution of individuals with intellectual disabilities or other mental impairments in these kinds of circumstances?

There are a number of other safeguards in place in the Commonwealth criminal justice system to assist individuals with intellectual disabilities or other mental impairments.

These safeguards include:

- the discretion on the part of the AFP to take the circumstances of the case into consideration before determining whether to lay charges (further outlined above in question 1)
- factors and considerations in the *Prosecution Policy of the Commonwealth*, including the mental health or special vulnerability of the alleged offender (further outlined above in question 1)
- provisions in the *Crimes Act 1914* (Cth) (contained in Divisions 6, 7, 8, and 9) which outline alternative options such as discharge, acquittal and summary disposition for offenders suffering from mental illness or intellectual disability, and
- provisions in the *Evidence Act 1995* (Cth) (such as sections 13, 30 and 31) which deal with competence of witnesses with mental or intellectual disability, and with ways in which a

disability might be overcome by use of interpreters or by allowing adjustments to be made for the delivery of evidence.

c) Rather than relying on the mental impairment defence, would it be a better approach for the Bill to specifically create exemptions from the proposed new offences for situations involving mental impairment?

As the Department has outlined in its two submissions to the Committee, the proposed new offences would be too broad in application and would capture conduct that is innocent and not warranting of criminal sanctions.

While a specific exemption may protect individuals with a mental impairment who innocently misrepresent their age to a minor, the proposed offences would still criminalise many other types of behaviour where there is a misrepresentation of age to a minor and an intention to arrange a physical meeting, but no intention to exploit or otherwise harm a minor. Some examples of such behaviour were provided by the Department during the Committee hearing on 3 March 2014.