

# CHAPTER 2

## Key Issues

2.1 The committee notes at the outset that the issues raised during this inquiry are substantially the same as those raised during the committee's inquiry into the previous iteration of the 2013 Bill, which reported in June 2013.<sup>1</sup> Submitters and witnesses were broadly supportive of the objective of the Bill—protecting young people from online predators.<sup>2</sup> The majority of submitters and witnesses, however, were not supportive of the Bill as a means of achieving this objective, and raised concerns with the formulation of the Bill, consistent with those raised during the committee's 2013 inquiry.

### Duplication of existing offences in the Criminal Code

2.2 Several submitters and witnesses expressed the view that the proposed offences in the Bill are unnecessary in light of existing offences in the Criminal Code that address the targeting of minors by sexual predators online, namely: section 474.26 (the offence of procurement); section 474.27 (the offence of grooming); and section 474.14 (the offence of using a telecommunications network with intention to commit a serious offence).<sup>3</sup>

2.3 The Attorney-General's Department (the department) stated that 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'.<sup>4</sup> The ACT Government highlighted that, for example, the existing grooming offence 'does not require proof that the communication be indecent' and so would appear to capture a communication in which the adult misrepresents their age.<sup>5</sup>

### *Adequacy of the existing offences*

2.4 Senator Xenophon stated that the current offences relating to grooming and procurement both require an element of sexual intent on the part of the adult in order for the offences to be made out, and explained that the purpose of the proposed new

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1 See: Senate Legal and Constitutional Affairs Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, June 2013, pp 3-8.

2 See, for example: Australian Human Rights Commission, *Submission 3*, p. 3; Mr Anthony Coles, Attorney-General's Department, *Committee Hansard*, 3 March 2014, p. 13;

3 See, for example: Attorney-General's Department, *Submission 2*, p. 3; The Law Society of Western Australia, *Submission 5*, p. 1; Queensland Commission for Children and Young People and Child Guardian, *Submission 7*, pp 1-2. See also: Senate Legal and Constitutional Affairs Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, June 2013, pp 3-4.

4 *Submission 2*, p. 3.

5 *Submission 1*, p. 3.

offences in the Bill is to allow law enforcement agencies to act before a sexual intent has been expressed in the communications.<sup>6</sup>

2.5 Ms Sonya Ryan, Director of the Carly Ryan Foundation, argued that this approach is necessary in order to counter more sophisticated strategies used by online predators to avoid falling foul of the existing offences:

[T]he problem is that a predator will take quite a bit of time to groom a child, without showing any sexual intent—this is what we have found through the work that we are doing—and, by the time a child agrees to meet a predator face to face, he or she no longer thinks of that person as a stranger.

We are seeking to add this law to address the common denominator in the way that online predators behave. They all set up false online profiles and most reduce their age online to present as a peer to the child, with the intention to meet that child. The idea of this law is to prevent the sexual act happening to a child—therefore preventing the potential trauma to a child, which obviously can cause lifelong problems for a young person and all kinds of future problems.<sup>7</sup>

2.6 Ms Susan McLean, a cyber-safety expert with over 20 years' experience working for Victoria Police, agreed that in her experience there have been situations in which police were unable to act because the behaviour of suspects fell short of proving the element of sexual intent in the existing offences, and that this represents a deficiency in the law.<sup>8</sup>

#### *Operational approach of the Australian Federal Police*

2.7 Representatives from the Australian Federal Police (AFP) did not share this concern that the existing laws are deficient. Mrs Elsa Sengstock explained that there is already potential for law enforcement to initiate operations to disrupt potential offenders even before sexual intent has been shown:

From an operational perspective...in a situation where you have someone who is 60 chatting to a 13-year-old, it is a very real possibility that the police would have reasonable suspicion that there is malintent there, that there is an underlying sexual purpose. That would then trigger us to use our investigative powers for the substantive grooming offence. There will be an opportunity for us to intervene and seek evidence of that offence, and that in itself would have a disruptive effect. We do not have to wait until just in the nick of time. That is why we have the procuring offence; it allows you to intervene before the actual act happens. The grooming offence allows you to intervene at the stage preparatory to that.<sup>9</sup>

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6 *Committee Hansard*, 3 March 2014, pp 2 and 3.

7 *Committee Hansard*, 3 March 2014, p. 3.

8 *Committee Hansard*, 3 March 2014, p. 3.

9 Mrs Elsa Sengstock, Australian Federal Police, *Committee Hansard*, 3 March 2014, p. 18.

2.8 Mrs Sengstock confirmed that even when such intervention does not uncover material that would lead to an individual being charged with an offence, it can still have a preventative effect:

[In cases where] there may not be evidence to make the substantive offence, but there has been a police presence, an intervention, that could have a disruptive and preventative effect... [Now that the individual] has come to the attention of police that does go to the intelligence picture of that person. They would come under more scrutiny. I suppose there is also a chance that the child has been—there has been a situation in which it is not just the parents saying: 'See, I told you they might be an older person. See, the police went and spoke to them and they are an older person. This is serious because the police have been involved.' So it does have that educative effect as well for the child, and hopefully stems any potential harm that the false relationship that had been cultivated might cause.<sup>10</sup>

2.9 AFP representatives concluded that the existing suite of available offences meet their operational needs to disrupt potentially harmful contact between adults and minors online.<sup>11</sup>

### **Formulation of the proposed new offences in the Bill**

2.10 Submitters and witnesses raised several concerns with the formulation of the offences in proposed new section 474.40 of Schedule 1 of the Bill, which largely mirrored those raised during the committee's 2013 inquiry.<sup>12</sup>

#### ***Scope of the proposed offences***

2.11 Several submitters and witnesses argued that the proposed offences, particularly proposed subsection 474.40(1) in relation to encouraging a physical meeting, are drafted too broadly. The overriding concern expressed was that the proposed offences in the Bill would wrongly criminalise behaviour that is not inherently criminal. For example, the New South Wales Council for Civil Liberties argued:

[T]he proposals in the bill have the potential to impact greatly on many Australians, young and old alike, who do not necessarily possess any criminal intent, without providing sufficient nexus to the more serious offences the bill aims to prevent...

[E]ncouraging a meeting is not a criminal offence and nor should it be, whether or not a person is lying about their age. It is untenable that such an action could result in a person being subject to five years imprisonment – whether or not a meeting actually takes place – and whether or not some other offence is subsequently committed...[T]his proposed section would

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10 *Committee Hansard*, 3 March 2014, p. 18.

11 Mrs Elsa Sengstock, Australian Federal Police, *Committee Hansard*, 3 March 2014, p. 19.

12 See: Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, June 2013, pp 4-8.

criminalise [behaviour] that might be considered reprehensible, unusual, or strange, but not sufficiently harmful to be criminal in nature.<sup>13</sup>

2.12 The department restated its position that the breadth of activity covered by the proposed offences goes beyond the accepted limits of criminal responsibility, and represents a departure from existing Commonwealth criminal law policy.<sup>14</sup> The department also argued that proposed new paragraphs 74.40(1)(b) and 474.40(2)(b), which state that the sender need only have an intention to misrepresent their age to a child online to make out that element of the offence (as opposed to the requirement for an actual misrepresentation of age), are too broad, and that a requirement for an actual misrepresentation to be made would be more appropriate.<sup>15</sup>

*Encouraging a physical meeting – proposed new subsection 474.40(1)*

2.13 Witnesses and submitters raised specific issues in relation to the proposed offence in subsection 474.40(1) of Schedule 1 of the Bill, in relation to encouraging a physical meeting. It was generally agreed that it would be difficult if not impossible to conceive of a situation where, for example, a 60 year old misrepresented their age online to a minor in order to encourage a meeting, without some nefarious intent.<sup>16</sup> Concerns were raised, however, that more benign, non-criminal behaviours would still be caught within the scope of the proposed offence. Mr Anthony Coles from the department informed the committee:

Take, as an example, the 18-and-one-month-year-old who says that he or she is 17 because they want to get an invite to the 16th birthday party of the person who is about to turn 16. There is no criminal intent there, but on the face of this legislation that would be a criminal offence.<sup>17</sup>

*Misrepresentations that could have been made in person*

2.14 The Law Society of South Australia argued that the offences could capture behaviour that is not dependent on the anonymity of an online setting; while a 60 year old could not make a misrepresentation to a minor without 'hiding behind a technological curtain', in cases such as an 18 year old misrepresenting his/her age as 17 to someone he/she believes to be 15 years old, the misrepresentations could equally have been made in person.<sup>18</sup>

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13 *Submission 4*, pp 1-2.

14 *Submission 2*, p. 3. See also: Attorney-General's Department, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, April 2013, p. 5.

15 Mr Anthony Coles, Attorney-General's Department, *Committee Hansard*, 3 March 2014, p. 14. See also: Law Society of South Australia, *Submission 6*, p. 3.

16 See, for example: Law Society of South Australia, *Submission 6*, p. 4; Mr Anthony Coles, Attorney-General's Department, *Committee Hansard*, 3 March 2014, pp 17 and 18.

17 *Committee Hansard*, 3 March 2014, p. 14.

18 *Submission 6*, p. 4.

2.15 In such a situation:

The fact [misrepresentations] 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.

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.<sup>19</sup>

2.16 The Law Society of South Australia argued that an 'upwards' misrepresentation of age, where a person misrepresents their age to be older than their true age, should also not be criminalised on the same basis that it could have equally occurred in a face-to-face interaction.<sup>20</sup>

*Mental impairment or incapacity*

2.17 Another issue discussed at the committee's public hearing was whether the proposed new offence in subsection 474.40(1) would criminalise the behaviour of individuals with an intellectual disability or cognitive impairment who innocently misrepresent their age to a minor online. Witnesses including Ms Susan McLean agreed that such individuals need to be protected from criminal liability:

[T]here are many people with an intellectual disability—those on the autism spectrum or particularly lonely young people who have a mental impairment—who do not have the ability to form an intention or knowledge that what they are doing is wrong. They want to have a friend—any friend. They want to connect with someone who is similar to them. While their physical age might be 25, they may be working on the capacity of an eight-year-old. So those are absolutely the people we do not want to get caught up in this law.<sup>21</sup>

2.18 The department indicated that the mental fitness of a suspect may be considered by the AFP when deciding whether to lay charges in relation to any Commonwealth offence, and that mental fitness may also be considered by the Commonwealth Director of Public Prosecutions in deciding whether to prosecute an individual based on the evidence brief provided by the AFP.<sup>22</sup> Section 7.3 of the Criminal Code provides that a person is not criminally responsible for an offence if the person was suffering from mental impairment that had the effect specified in

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19 Law Society of South Australia, *Submission 6*, p. 4.

20 *Submission 6*, p. 4.

21 Ms Susan McLean, *Committee Hansard*, 3 March 2014, p. 5.

22 Attorney-General's Department, *Answers to questions on notice provided on 18 March 2014*, p. 1.

that section,<sup>23</sup> and during a prosecution it is a matter for the court to decide whether that defence is successfully made out.<sup>24</sup>

### **Committee view**

2.19 The safety of young people online is an issue of utmost importance, and one that requires a careful and considered policy response. The committee supports the intent of the Bill in aiming to protect minors from online predators.

2.20 The committee notes that some minor amendments have been made to the Bill, compared with the previous version of the Bill which the committee examined and reported on in June 2013.

2.21 The committee acknowledges, however, that some stakeholders to the inquiry raised concerns in relation to the Bill, particularly that it may not be necessary in view of existing offences in the *Criminal Code Act 1995* and that the offence provisions in the Bill may be too broad. In light of these concerns, the committee considers that further consultation should be undertaken in relation to the Bill to determine whether it is the best available means of meeting the policy intent underpinning the Bill.

### **Recommendation 1**

**2.22 The committee recommends that further consultation is conducted on the Bill prior to its consideration by the Senate.**

**Senator the Hon Ian Macdonald**  
**Chair**

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23 Subsection 7.3(1) outlines that the mental impairment must have had the effect that: the person did not know the nature and quality of the conduct; or the person did not know the conduct was wrong; or the person was unable to control the conduct.

24 Attorney-General's Department, *Answers to questions on notice provided on 18 March 2014*, p. 2.