

Chapter 1

Introduction and background

1.1 On 30 March 2017, pursuant to the recommendation of the Selection of Bills Committee, the Senate referred the provisions of the Criminal Code Amendment (Protecting Minors Online) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 13 June 2017.¹

Background and purpose of the bill

1.2 As outlined in the Explanatory Memorandum, the bill proposes to introduce a new criminal offence relating to the use of a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under the age of 16.²

The bill promotes the protection of children under the age of 16 from online predators by allowing intervention by law enforcement prior to harm or sexual activity taking place. Under this Bill, if an adult uses a carriage service to prepare or plan to cause harm, procure, or engage in sexual activity with a person under the age of 16, that person will have committed an offence. This includes a person misrepresenting their age online as part of a plan to cause harm to another person under 16 years of age.³

1.3 During the second reading speech, the Minister for Justice and Minister Assisting the Prime Minister for Counter Terrorism, the Hon Michael Keenan MP, explained that the bill follows the murder of 15 year old Carly Ryan in 2007 by a 50 year old man who had posed online as a teenage boy.⁴ Mr Keenan noted:

Rapidly evolving technologies and the anonymity that the internet provides have resulted in unprecedented opportunities for the harm and sexual exploitation of our children...The bill extends the criminalisation of the use of the internet and social media as a forum for predators to groom or procure our children to engage in sexual activity to a broader range of conduct.

The offence builds upon the proactive policing of online child sex offences, allowing law enforcement to take action against online predators sooner and with greater consequence.⁵

1 *Journals of the Senate, No. 38, 30 March 2017, p. 1244.*

2 Criminal Code Amendment (Protecting Minors Online) Bill 2017, Explanatory Memorandum (Explanatory Memorandum), p. 2.

3 Explanatory Memorandum, p. 2.

4 *Proof House of Representatives Hansard, 30 March 2017, p. 10.*

5 *Proof House of Representatives Hansard, 30 March 2017, p. 10.*

Overview of the provisions of the bill

1.4 The bill contains two schedules—schedule one proposes amendments to the *Criminal Code Act 1995* (Criminal Code) and schedule two makes consequential amendments to the *Crimes Act 1914* (Crimes Act) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

Schedule one

1.5 Schedule one of the bill proposes to insert a new offence of using a carriage service to prepare or plan to cause harm, procure, or engage in sexual activity with a person under the age of 16 years (proposed section 474.25C). The Explanatory Memorandum notes that the proposed new offence targets 'preparatory conduct where the offender has not proceeded far enough for the conduct to be captured by existing offences such as the existing grooming and procuring offences'.⁶ Additionally, the proposed offence will capture conduct irrespective of whether a child has been communicated with or identified.

The focus on the conduct of the adult will ensure the offence applies where a law enforcement officer assumes the identity of a fictitious child to interact with predatory adults over the internet and social media. The predatory adult will be engaging in criminal conduct where he or she has an intention to cause harm to, procure or engage in sexual activity with the fictitious child.⁷

1.6 The reference to 'harm' in the proposed section includes both physical and mental harm as defined in the Criminal Code and includes circumstances where there is an intent to harm the child but no evidence of an intent to engage in sexual activity.⁸ Consequently, the conduct captures a broader range of conduct than currently exists in the Criminal Code.⁹

1.7 The reference to 'engaging in sexual activity' is not limited to real life sexual activity but also includes:

...preparing or planning to engage in *online* sexual activity with a child. 'Engaging in sexual activity' includes a person in the presence of another person (including by means of communication that allows the first person to see or hear the other person) while the other person engages in sexual activity. This definition extends to an act that does not necessarily require physical contact.¹⁰

1.8 An example provided in the Explanatory Memorandum of conduct which would be captured by this proposed paragraph includes a would be offender who

6 Explanatory Memorandum, p.10.

7 Explanatory Memorandum, p.11.

8 Explanatory Memorandum, p.11.

9 Explanatory Memorandum, p.11.

10 Explanatory Memorandum, p.12.

created an online gambling profile as part of a plan to masturbate in front of a web cam while a child watches through the online game.¹¹

1.9 The reference to 'procuring' includes 'encouraging, enticing, recruiting and inducing a child to engage in sexual activity' and covers situations where a child is encouraged to engage in 'consensual' sexual activity as well as where a child may be coerced to engage in 'non-consensual' activity.¹²

1.10 The proposed offence only targets adult offenders, that is, persons who are at least 18 years of age.¹³

1.11 The offence is punishable by a maximum penalty of 10 years imprisonment. The Explanatory Memorandum explains that the maximum penalty is less than the maximum penalty for other predatory child sex offences of procurement, which has a maximum penalty of 15 years imprisonment, and grooming, which has a maximum penalty of 12 years imprisonment.¹⁴

Schedule two

1.12 Schedule two of the bill proposes to make consequential amendments to the Crimes Act and the TIA Act. The heading of subsection 5D(3D) of the TIA Act would be amended to include 'harm to children'. The effect of this amendment would be to categorise the offence as a 'serious offence' for the purposes of the TIA Act. This would allow certain law enforcement agencies to apply for a warrant to intercept communications to support their investigations.¹⁵

1.13 Subparagraph 3(1)(a)(iv) and paragraph 15Y(1)(cba) of the Crimes Act would be amended to include the offence of 'harm' to a child. The Explanatory Memorandum notes that the change is required 'to ensure existing law enforcement powers available to Commonwealth child sex-related offences are available for the new offence'.¹⁶

Financial implications

1.14 The Explanatory Memorandum includes a financial impact statement that states the bill will have no financial impact on Commonwealth Government revenue.¹⁷

Reports by other committees and previous inquiries

1.15 The Explanatory Memorandum notes that the proposed amendments enliven the rights of the child (pursuant to the Convention on the Rights of the Child), as well as engaging a number of rights within the International Covenant on Civil and Political Rights. It also notes that the bill engages the right to protection against

11 Explanatory Memorandum, p.12.

12 Explanatory Memorandum, p.12.

13 Explanatory Memorandum, p.12.

14 Explanatory Memorandum, p.12.

15 Explanatory Memorandum, p.13.

16 Explanatory Memorandum, p.13.

17 Explanatory Memorandum, p. 3.

arbitrary and unlawful interference with privacy, and the right to freedom of expression.¹⁸ The Parliamentary Joint Committee on Human Rights reported that the bill does not raise human rights concerns.¹⁹

1.16 The Senate Standing Committee for the Scrutiny of Bills noted that the proposed offence reverses the burden of proof. This will be discussed in chapter 2.

1.17 This committee has inquired into three earlier bills which were designed to implement a similar policy. These bills were private senator's bills introduced by Senator Nick Xenophon and will be discussed in more detail in chapter 2.

Conduct of the inquiry

1.18 Details of the inquiry were advertised on the committee's website, including a call for submissions by 4 May 2017.²⁰ The committee also wrote directly to some individuals and organisations inviting them to make submissions. The committee received eight submissions, which are listed at appendix 1 of this report. These submissions are available in full on the committee's website.

1.19 A public hearing was held by the committee on 2 June 2017, in Canberra. A list of witnesses who appeared before the committee is listed at appendix 2, and a Hansard transcript of the hearing is also available on the committee's website.

Structure of this report

1.20 This report consists of two chapters:

- This chapter provided a brief background and overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 discusses the issues raised by submitters and witnesses to the inquiry. It also outlines the committee's views and recommendation.

Acknowledgements

1.21 The committee thanks the organisations and individuals that made submissions to this inquiry and all witnesses who attended the public hearing.

18 Explanatory Memorandum, pp. 5–8.

19 Parliamentary Joint Committee on Human Rights, *Scrutiny Report 4 of 2017*, 9 May 2017, p. 74.

20 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs.