

The Senate

Legal and Constitutional Affairs
Legislation Committee

Criminal Code Amendment (Protecting
Minors Online) Bill 2017 [Provisions]

June 2017

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Recommendation

Recommendation 1

2.58 The committee recommends that the Senate pass the bill.

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.

Chapter 2

Key issues

2.1 A number of issues were raised about the Criminal Code Amendment (Protecting Minors Online) Bill 2017 (the bill) during the inquiry. This chapter will outline issues raised by submitters and witnesses and provide the committee's views and recommendation on the bill.

Support for the intention of the bill

2.2 Most submitters noted their overall support for the intention of bill. The Carly Ryan Foundation provided its 'full support to the amendments proposed'.¹ The Sexual Assault Support Service noted that it 'strongly supports the intention and content of the Bill'² and the Queensland Family and Child Commission stated:

The QFCC supports the intent of the amendments to protect children under the age of 16 from online predators by allowing intervention by law enforcement agencies prior to harm taking place.

We also support the amendments which make it an offence for a person to misrepresent their age online as part of a plan to cause harm to another person under 16 years of age.³

2.3 While submitters expressed their support for the broad intent of the bill—to protect children from online predators—concerns were raised that the bill may not be effective. The Australian Lawyers Alliance (ALA) noted that the bill relates to one of the most serious crimes under Australian law and emphasised the importance of protecting children and adequately punishing people who seek to harm children.⁴ However, the ALA considered that the bill 'is not sufficiently targeted to prevent harm to children'.⁵

2.4 The Law Council of Australia (Law Council) similarly expressed its support for the intent of the bill, however was concerned with a number of aspects of the bill and ultimately arrived at the view that the bill should not be passed in its current form.⁶

Previous bills

2.5 The committee has considered and reported on three previous bills with a similar policy intent as the current bill:

1 Carly Ryan Foundation, *Submission 7*, pp. 1–2.

2 Sexual Assault Support Service, *Submission 2*, p. 1

3 Queensland Family and Child Commission, *Submission 4*, p. 1.

4 Australian Lawyers Alliance, *Submission 3*, p. 4.

5 Australian Lawyers Alliance, *Submission 3*, p. 4.

6 Law Council of Australia, *Submission 1*, p. 5.

- Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010, introduced in February 2010 and reported on 30 June 2010;
- Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013, introduced in February 2013 and reported on 27 June 2013; and
- Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013, introduced in December 2013 and reported on 13 August 2015.

2.6 All three bills were private senator's bills introduced by Senator Nick Xenophon and proposed a number of offences relating to a person over the age of 18 who intentionally misrepresents their age in online communications to a person who is, or whom the sender reasonably believes to be under 18 or 16 years of age.⁷ Other offences proposed in the bills introduced in February 2013 and December 2013 related to using a carriage service with the intention of misrepresenting the sender's age and for a number of purposes including, making it easier to meet with the recipient, encouraging a physical meeting, or with the intention of committing an offence with a minor.⁸

2.7 In previous inquiries the committee noted its support for the bills' objectives but recommended that the Senate not pass the first two bills. In arriving at that recommendation, the committee noted that the bill introduced in February 2010 failed to incorporate an element of intent and that the bill 'duplicates and does not improve on the existing procurement and grooming provisions relevant to carriage service communications'.⁹

2.8 The committee's reasons for recommending that the Senate not pass the bill introduced in February 2013 was that the bill 'is not necessary and is too broad'.¹⁰ In relation to the breadth of the proposed offence, the committee stated:

The committee agrees that, as a general principle, criminal offences must be precisely defined, and should avoid capturing non-criminal conduct unless there is a clear nexus between that conduct and the criminal conduct which is the subject of the offence. The committee agrees that the proposed offences, while potentially criminalising a broader range of conduct than that already covered in the Criminal Code, capture conduct that goes beyond reasonable and accepted limits of criminal responsibility.¹¹

7 The bill introduced in February 2010 proposed to prohibit communication with a person under the age of 18 years. The later bills of February 2013 and December 2013 amended this age to 16 years of age.

8 Law Council of Australia, *Submission 1*, p. 6 and Attorney-General's Department, *Submission 6*, p. 4.

9 Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010*, 30 June 2010, p. 10.

10 Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, 27 June 2013, p. 9.

11 Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, 27 June 2013, p. 8.

2.9 The committee noted the same concerns in relation to the bill introduced in December 2013—that it may not be necessary in light of the existing offences in the Criminal Code and that the bill may be too broad.¹² The committee concluded that further consultation should be undertaken to determine the best way of implementing the policy intent of the bill, and recommended 'that further consultation is conducted on the Bill prior to its consideration by the Senate'.¹³

2.10 The Law Council noted that it had made submissions to the previous bill inquiries, and had opposed all three bills. The Law Council expressed the view that the proposed offence in the current bill, 'only exacerbates its concerns' with the previous three bills.¹⁴ These concerns will be discussed below.

2.11 The Attorney-General's Department (AGD) noted that the proposed offence is narrower in its application than the previous three bills as it includes an intention to cause harm as opposed to an intention of merely misrepresenting the sender's age.¹⁵ It is noted that the bill introduced in February 2010 had a fault element of an intention of misrepresenting age. The bill introduced in February 2013 similarly had a fault element of an intention of misrepresenting age as well as the intention of encouraging the recipient to meet with the offender.¹⁶

Duplication of existing offences

2.12 A number of submitters noted that the Criminal Code has existing offences which criminalises using a carriage service to procure or groom persons under 16 years of age. In particular, submitters outlined that it is an offence under sections 474.26 and 474.27 of the Criminal Code to transmit a communication to another person with the intention of procuring, or making it easier to procure, the recipient to engage in sexual activity with the sender.¹⁷

2.13 The ALA noted that these existing offences already 'constitute a significant expansion of the traditional scope of criminal law' where criminal penalties usually apply only after harm to people or property has occurred.¹⁸ The ALA explained that a child does not need to have been harmed for these offences to apply as the test is the use of a carriage service to transmit a communication to a person whom the sender

12 Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, August 2015, p. 10.

13 Senate Legal and Constitutional Affairs Legislation Committee, *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013*, August 2015, p. 10.

14 Law Council of Australia, *Submission 1*, p. 7.

15 Attorney-General's Department, *Submission 6*, p. 4.

16 Attorney-General's Department, *Submission 6*, p. 4 and Law Council of Australia, *Submission 1*, p. 6

17 Law Council of Australia, *Submission 1*, p. 7. See also *Submission 5*, p. 1 and *Submission 3*, p. 6.

18 Australian Lawyers Alliance, *Submission 3*, p. 5.

believes is under the age of 16.¹⁹ According to the ALA, the current provisions strike the right balance between keeping children safe and ensuring that individuals who pose a genuine risk are captured by legislation.²⁰ It noted that '[i]t is unclear what the provision proposed in the Bill would add to the existing offences under the Criminal Code in terms of protecting children'.²¹

2.14 The AGD acknowledged that other provisions within the Criminal Code currently capture online child sex offences, however, explained how the proposed offence differs to current offences:

The proposed offence in the bill captures acts that do not amount to direct communication with a specific child. This reflects the evolving nature of the internet and social media use, where direct messaging or communication between two people no longer represents the scope of online predatory activity. Online communication involves individuals broadcasting information to a large audience with no one particular recipient in mind. The creation of an online profile, membership of an online group or posting to the online world at large do not fall within the existing offences. The proposed offence also captures acts that prepare or plan to cause harm to a child, including harm that is not limited to sexual activity.²²

2.15 In relation to offences that capture conduct relating to the use of a carriage service to cause harm to a child, which is not limited to sexual activity, both Dr Gregor Urbas and the Law Council noted that a number of existing offences would capture such activity.²³ This includes section 474.14 of the Criminal Code which relates to the use of a telecommunications network with the intention to commit a serious offence, and section 474.17 relating to the use of a telecommunications network to menace, harass or engage in conduct that is offensive.²⁴ The Law Council concluded 'there are a number of provisions which would catch conduct involving the use of a telecommunications network where there was an intention to engage in serious misconduct other than sexual activity'.²⁵

19 Australian Lawyers Alliance, *Submission 3*, p. 5.

20 Australian Lawyers Alliance, *Submission 3*, p. 5.

21 Australian Lawyers Alliance, *Submission 3*, p. 5.

22 Ms Anne Sheehan, Acting First Assistant Secretary, Attorney-General's Department (AGD), *Proof Committee Hansard*, 2 June 2017, p. 16.

23 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 7. See also Dr Gregor Urbas, *Submission 5*, p. 1.

24 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 7. See also Dr Gregor Urbas, *Submission 5*, p. 1.

25 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 7.

2.16 The proposed offence would apply to online conduct such as 'trolling' which could also be captured by section 474.17 of the Criminal Code.²⁶ However, a significant difference between section 474.17 of the Criminal Code and the proposed offence is that section 474.17 carries a maximum penalty of three years imprisonment and the proposed offence carries a maximum penalty of 10 years imprisonment.²⁷

2.17 Despite what appears to be a level of duplication to some of the existing offences within the Criminal Code, Dr Urbas expressed a degree of support for the proposed offence. Dr Urbas noted that the existing offences are used 'reasonably frequently to prosecute online offenders seeking to exploit or harm children',²⁸ and that the introduction of the proposed offence may close existing gaps:

[The existing offences] are relatively recent and their precise scope is not always clear in the absence of judicial consideration, so that it may be that there are still gaps in the coverage of the Code in relation to online abuse.²⁹

Breadth of the offence

2.18 One of the substantive differences between the proposed offence and existing offences is that the proposed offence captures preparatory conduct, that is, 'any act in preparation for doing, or planning to do' any of the listed acts in proposed section 474.25C. The Explanatory Memorandum explains:

New section 474.25C criminalises a broader range of conduct preparatory to causing harm to a child than the existing procurement and grooming offences...In particular, the 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.³⁰

2.19 The AGD explained that the proposed offence does not require online communication between two individuals and would capture conduct such as, '...creation of an online profile, membership of an online group or posting to the online world at large'.³¹ The proposed offence also captures acts done in preparation of causing harm to a child, other than engaging in sexual activity.³²

2.20 The proposed scope of the offence was of concern to a number of submitters, particularly in relation to the capture of preparatory conduct when combined with the

26 Ms Monica Biddington, Criminal Code Amendment (Protecting Minors Online) Bill 2017, *Bills Digest No. 100*, 2016–17, Parliamentary Library, Canberra, 2017, p. 6.

27 Ms Monica Biddington, Criminal Code Amendment (Protecting Minors Online) Bill 2017, *Bills Digest No. 100*, 2016–17, Parliamentary Library, Canberra, 2017, p. 6.

28 Dr Gregor Urbas, *Submission 5*, p. 1.

29 Dr Gregor Urbas, *Submission 5*, p. 1.

30 Criminal Code Amendment (Protecting Minors Online) Bill 2017, Explanatory Memorandum (Explanatory Memorandum), p. 10.

31 Ms Anne Sheehan, Acting First Assistant Secretary, AGD, *Proof Committee Hansard*, 2 June 2017, p. 16.

32 Explanatory Memorandum, p. 11.

broad definition of 'harm'.³³ Some submitters also raised that the fault element for the proposed offence was not clear³⁴ and one submitter noted that it was not clear how the proposed provision would operate with state and territory legislation.³⁵

Preparatory acts

2.21 The Law Council raised concerns that the proposed provision was framed too broadly and would capture conduct prior to 'any criminal intent [having] crystallised into any attempt to cause harm, procure, or engage in sexual activity with a person under 16 years of age'.³⁶

2.22 At the public hearing, the Law Council elaborated on this point and noted that principles established in the Criminal Code at section 11.1 relating to extensions of criminal liability should be applied to the proposed offence.³⁷ The Law Council noted that section 11.1 is the 'attempt' provision, and provides that a person who attempts to commit an offence is punishable as if the person committed the offence, provided two requirements are met:

- firstly, that the person's conduct must be more than merely preparatory (section 11.1(2) of the Criminal Code);
- secondly, that the fault elements for the offence are intention and knowledge (section 11.1(3) of the Criminal Code).³⁸

2.23 The Law Council explained the rationale behind these principles:

The rationale behind subsection (2), the more than merely preparatory aspect of the attempt requirement, is essentially that thought crimes should not be enacted and that a criminal intention should be manifested by conduct that demonstrates that the person has moved from thinking about committing a crime to actually perpetrating it...

The rationale behind subsection (3) in 11.1 is that, since the attempt offence is criminalising conduct that does not itself cause harm but is antecedent to the causing of harm, cases deserving punishment require the most culpable mental state—that is, intention.³⁹

33 Law Council of Australia, *Submission 1*, pp. 9–10 and Australian Lawyers Alliance, *Submission 3*, pp. 5–6.

34 Law Council of Australia, *Submission 1*, p. 8 and Dr Gregor Urbas, *Submission 5*, p. 2.

35 Sexual Assault Support Service, *Submission 2*, p. 1.

36 Law Council of Australia, *Submission 1*, p. 9.

37 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 6.

38 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 6.

39 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 6.

2.24 The Law Council went on to explain that the fault element to be proved for the proposed provision is not well articulated. According to the Law Council the proposed provision would require 'intention' to be the fault element pursuant to section 5.6 of the Criminal Code.⁴⁰ However, the way the proposed provision has been drafted would only require an intention to, for example, post a profile on the internet or a misrepresentation on a post of some kind.⁴¹ The Law Council argues that the proposed offence does not make clear that the fault element is that the person intended to prepare or planned to cause harm to, engage in sexual activity with, or procure a person under the age of 16 years to engage in sexual activity.⁴²

2.25 The ALA agreed, noting that the proposed offence could potentially capture conduct such as the act of connecting to a mobile phone or internet service, or purchasing a computer, provided an intention existed.⁴³ It concluded that:

Criminalising such acts with no further evidence that offences against ss474.26 or 474.27 have been committed would be excessive, and unlikely to protect children in practice. It would, however, be likely to leave people liable to arrest or prosecution for activities that did not and would not pose any genuine risk to children.⁴⁴

2.26 The Law Council reflected on the terms of section 272.20 of the Criminal Code and suggested that the proposed provision should be drafted in similar terms. In a supplementary submission, the Law Council outlined that the proposed offence could be worded the following way:

- (1) A person commits an offence if:
 - (a) the person does an act;
 - (b) the act is done using a carriage service;
 - (c) the person is at least 18 years of age; and
 - (d) the person intends to facilitate any of the following:
 - (i) causing serious harm to a person under 16 years of age;
 - (ii) engaging in sexual activity with a person under 16 years of age;

40 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 7.

41 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 7. See also submission from Dr Urbas, *Submission 5*, p. 2, where he also notes that the fault element for the proposed offence is not clear.

42 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 7.

43 Australian Lawyers Alliance, *Submission 3*, p. 5.

44 Australian Lawyers Alliance, *Submission 3*, p. 6.

- (iii) procuring a person under 16 years of age to engage in sexual activity.

(2) Absolute liability applies to paragraph (1)(b) and paragraph (1)(c) of the offence.⁴⁵

2.27 According to the Law Council, the above drafting would make clear that the fault element applies to the 'act' (that is, causing serious harm, engaging in sexual activity, procuring), as well as the 'facilitation' (that is, the preparation or planning).

2.28 However, according to the AGD, the proposed offence already clearly articulates the intention—'You do need to have intention to do an act to prepare for causing harm, engaging in sexual activity or procuring sexual activity'.⁴⁶

2.29 In relation to the Law Council's argument that extensions of criminal liability relating to the 'attempt' provisions of the Criminal Code should be adopted for the proposed offence, the AGD noted that this would not achieve the policy objective of the new offence:

Liability for attempt arises from conduct that is more than merely preparatory. The proposed offence targets conduct that would occur before liability for attempt would arise.⁴⁷

2.30 The significance of the proposed offence to capture preparatory acts was explained by the Australian Federal Police:

Whilst the current offences are adequate to provide prosecutorial avenues... where offenders have made contact and what have you with potential victims, the additional offences would assist us in preventing and deterring such contact being made. Essentially, it will assist as far as going down the path of allowing us to undertake activities or intervene prior to an offence occurring, as far as contact-type offences occurring, which is the case with the current offences.⁴⁸

2.31 The Carly Ryan Foundation was also of the view that 'the most powerful part of this legislation is the fact that we are going to prevent harm against children. It is going to give police more power to be able to intervene sooner'.⁴⁹

Definition of 'harm'

2.32 The proposed offence prohibits a person from doing any act in preparation for, or planning to cause harm to a person under 16 years of age. 'Harm' is defined in

45 Law Council of Australia, *Submission 1.1*, p. 1.

46 Ms Anne Sheehan, Acting First Assistant Secretary, AGD, *Proof Committee Hansard*, 2 June 2017, p. 17.

47 Ms Anne Sheehan, Acting First Assistant Secretary, AGD, *Proof Committee Hansard*, 2 June 2017, p. 16.

48 Superintendent Heath Davies, Acting Manager, Victim-based Crime, Australian Federal Police (AFP), *Proof Committee Hansard*, 2 June 2017, p. 16.

49 Ms Sonya Ryan, Chief Executive Officer and Founder, Carly Ryan Foundation, *Proof Committee Hansard*, 2 June 2017, p. 1.

the dictionary in the Schedule of the Criminal Code to include physical harm and harm to a person's mental health, which is further defined:

'physical harm' includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).

'harm to a person's mental health' includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.⁵⁰

2.33 The Law Council noted the broad definition of 'harm' as outlined in the Criminal Code and explained that causing harm to a person under the age of 16 is not a criminal offence.

Of course, insofar as 'harm' includes 'physical harm', there are a number of state and territory offences of personal violence to which a connection could be drawn. However, with one exception relating to causing harm from unlawful manufacturing of drugs, the substantive offences in the Criminal Code that criminalise 'causing harm' do not relate to causing harm to a person under 16 and, in any event, there is no general offence of causing harm to the mental health of a person under 16 in any jurisdiction in Australia.⁵¹

2.34 The Law Council explained that the effect of the proposed provision would be to criminalise conduct which would not, of itself, constitute a criminal offence.

2.35 The Law Council suggest that the proposed provision be redrafted, with 'harm' replaced by 'serious harm', which is defined in the Criminal Code in the following way:

harm (including the cumulative effect of any harm):

- (a) that endangers, or is likely to endanger, a person's life; or
- (b) that is or is likely to be significant and longstanding.⁵²

2.36 The Law Council raised concerns that the terms 'harm' and 'serious harm' were too nebulous, particularly in light of it applying to a preparatory offence, however conceded that if the bill proceeds, the term 'serious harm' is preferable arguing that '[a]n intention to facilitate the causing of harm that is not serious harm should not be subject to a penalty of 10 years imprisonment'.⁵³

2.37 Concerns were also raised that the broad definition of harm could potentially lead to police exercising discretion that conduct was more than merely 'trivial physical

50 These definitions are found in the Dictionary in the Schedule of the *Criminal Code Act 1995* (Criminal Code).

51 Law Council of Australia, *Submission 1*, p. 11.

52 This definition is found in the Dictionary in the Schedule of the Criminal Code.

53 Law Council of Australia, *Submission 1.1*, p. 2.

contact' or 'ordinary emotional reactions'.⁵⁴ This could result in a high number of persons being charged with the proposed offence.⁵⁵

2.38 In response to the Law Council's concerns, the AGD explained that offences against a person are generally the jurisdiction of states and territories and that it is an offence in each state and territory to assault a person, including persons under the age of 16.⁵⁶ Consequently, this would capture conduct which would cause 'physical harm'.⁵⁷ The AGD noted that in a number of states and territories it is also an offence to cause 'harm to a person's mental health' and that the common law recognises that actual bodily harm is capable of including psychiatric injury.⁵⁸ The AGD reiterated and elaborated on this point at hearing:

There are a number of state and territory offences that go directly to causing harm, and the way that is defined includes mental harm. There are also some states, in their definition of 'assault', where courts have interpreted 'causing bodily harm' to include psychiatric injury. I guess to bring that back to this offence and the way that this is structured, the issue that the Law Council raised in their submission is that if the ultimate offence of causing harm is not a criminal offence, then is it appropriate to criminalise the preparatory steps. In large part it is a criminal offence in states and territories to cause mental harm.

I guess the policy intention behind the bill is not to specifically link this offence with a specific state offence. I think to do so would really increase the complexity of the offence and, in doing so, likely reduce its effectiveness. In referring in this offence to the Commonwealth code definition of 'harm' ensures uniform operation of that law across Australia.⁵⁹

Application with state criminal legislation

2.39 The Sexual Assault Support Service expressed its strong support for the intention and content of the bill, however raised that it was not clear how the bill would operate with particular sections of the Tasmanian *Criminal Code Act (1924)*:

[Sections 125B and 125D of the *Criminal Code Act*] allow for the consent of the person against whom a crime is alleged to have been committed to be a defence, if at the time when the crime was alleged to have been committed, the person was of or above the age of 15 years and the accused person was not more than 5 years older. Under the *Criminal Code Act*, this

54 Ms Monica Biddington, Criminal Code Amendment (Protecting Minors Online) Bill 2017, *Bills Digest No. 100*, 2016–17, Parliamentary Library, Canberra, 2017, p. 7.

55 Ms Monica Biddington, Criminal Code Amendment (Protecting Minors Online) Bill 2017, *Bills Digest No. 100*, 2016–17, Parliamentary Library, Canberra, 2017, p. 7.

56 Attorney-General's Department, *Submission 6*, p. 4.

57 Attorney-General's Department, *Submission 6*, p. 4.

58 Attorney-General's Department, *Submission 6*, p. 4.

59 Ms Anne Sheehan, Acting First Assistant Secretary, AGD, *Proof Committee Hansard*, 2 June 2017, p. 21.

defence would therefore allow a 20 year old adult to communicate with intent to procure a 15 year old young person, whereas under the Criminal Code Amendment (Protecting Minors Online) Bill 2017 we understand that this would be a chargeable offence.⁶⁰

2.40 The AGD explained that the Criminal Code has provisions which allow state and territory laws to operate without inconsistency with the Commonwealth's Criminal Code.⁶¹ The AGD noted that:

This part of the code states specifically that it is not intended to exclude or limit the operation of any of the law of the Commonwealth or any law of a state or territory.⁶²

Reversed burden of proof

2.41 The Senate Standing Committee for the Scrutiny of Bills noted that the proposed offence reverses the burden of proof.⁶³ The Scrutiny of Bills Committee explained that the proposed provision will be inserted into Subdivision F of Division 474 of the Criminal Code which has the result of the presumption in existing section 475.1B of the Criminal Code applying.⁶⁴ The Scrutiny of Bills Committee explained the effect of this provision applying would be to reverse the burden of proof:

[Section 475.1B] provides that if a physical element of a relevant offence consists of a person using a carriage service to engage in particular conduct and the prosecution proves beyond reasonable doubt that the person engaged in that conduct, it is presumed, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct. A defendant bears a legal burden of proof in relation to this matter.⁶⁵

2.42 The Scrutiny of Bills Committee explained that it is ordinarily the prosecution who has a duty to prove all the elements of an offence and in cases where the burden of proof has been reversed, it expects there to be a full justification.⁶⁶ It noted that the Explanatory Memorandum provides the following justification for reversing the burden of proof:

The purpose of this presumption is to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct. Often evidence that a carriage service was used to engage in the criminal conduct is entirely

60 Sexual Assault Support Service, *Submission 2*, p. 1

61 Ms Tara Inverarity, Acting Assistant Secretary, AGD, *Proof Committee Hansard*, 2 June 2017, p. 22.

62 Ms Tara Inverarity, Acting Assistant Secretary, AGD, *Proof Committee Hansard*, 2 June 2017, p. 22.

63 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 19.

64 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 19.

65 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 19.

66 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 19.

circumstantial, consisting of evidence, for example, that the defendant's computer had chat logs or social media profile information saved on the hard drive, that the computer was connected to the internet, and that records show the computer accessed particular websites that suggest an association with the material saved on the hard drive.

The Bill relies on the Commonwealth's telecommunications power under the Australian Constitution. Therefore, the requirement in the offence that the relevant criminal conduct be engaged in using a carriage service is a jurisdictional requirement. A jurisdictional element of the offence is an element that does not relate to the substance of the offence, or the defendant's culpability, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth than those that do not.⁶⁷

2.43 The Scrutiny of Bills Committee noted that while this appears to provide an explanation as to why the burden of proof is required to be reversed, the committee also noted that:

...this appears to provide a justification as to why the evidential burden of proof needs to be reversed, but not necessarily why the legal burden of proof needs to be reversed. However, the committee also notes that the relevant requirement (that the conduct engaged in uses a carriage service) is a jurisdictional requirement that does not relate to the substance of the offence.⁶⁸

2.44 The Scrutiny of Bills Committee concluded that it would leave the question of the appropriateness of reversing the burden of proof to the Senate as a whole.⁶⁹

2.45 The committee notes the advice provided in the Legislation Handbook relating to reversing the burden of proof:

- 6.26 The Attorney-General's Department must be consulted on provisions which:
- (a) reverse the burden of proof in criminal proceedings (to put the onus on the defendant);
this should be used only when the matters concerned are within the exclusive knowledge of the defendant or proof of the matters by the Crown would be difficult;
 - (b) empower a person to certify conclusively that certain facts exist;
 - (c) create criminal offences and impose pecuniary or imprisonment penalties; or
 - (d) empower officials to enter premises or examine property or documents.⁷⁰

2.46 The committee has considered the concerns raised by the Scrutiny of Bills Committee and the advice provided in the Legislation Handbook and is of the view that it is reasonable, in this case, for the burden of proof to be reversed.

67 Explanatory Memorandum, p. 6.

68 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 19.

69 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, 10 May 2017, p. 20.

70 Department of the Prime Minister and Cabinet, *Legislation Handbook*, 1999, p. 31

Issuing of telecommunication warrants

2.47 One of the consequential amendments proposed is the repeal of the heading under subsection 5D(3B) of the TIA Act, which currently reads '*Sexual offences against children and offences involving child pornography*' and substituting the heading with '*Sexual offences against children and offences involving child pornography or harm to children*'. The Explanatory Memorandum explains the significance of including the proposed offence as a serious offence for the purposes of the TIA Act, particularly as it applies to law enforcement agencies:

Item 3 amends subsection 5D(3B) of the TIA Act to specify that the new offence is included in the list of sexual offences against children to be considered a serious offence for the purposes of the TIA Act. The inclusion of the offence in Subdivision F of Division 474 of the Criminal Code means that law enforcement agencies that are interception agencies for the purposes of the TIA Act, are able to apply to an independent issuing authority for a warrant to intercept communications to support their investigations. As this type of criminal conduct predominantly occurs online, it is appropriate for law enforcement to have the tools available to them to detect, investigate and prosecute offences.⁷¹

2.48 In its submission, the Law Council raised concerns that this relatively low threshold, combined with the wide scope of the proposed offence, 'may result in unwarranted intrusions on privacy'.⁷²

2.49 The AGD explained that the TIA Act has a number of safeguards, accountability and oversight mechanisms which include:

- the grant or refusal of warrants are determined by an independent issuing authority;
- the TIA Act prescribes factors that the judicial authority must have regard to when deciding whether or not to grant a warrant, including:
 - the level of a person's privacy that is likely to be interfered with;
 - the gravity of the conduct constituting the offence or offences being investigated; and
 - the extent of the investigating methods, that do not involve intercepting communications, that have been used by or are available to the agency.
- the TIA Act prescribes a threshold of 'reasonably necessary' for the authorisation for access to telecommunications data, which would not allow access to data if it is merely helpful or expedient; and

71 Explanatory Memorandum, p. 13.

72 Law Council of Australia, *Submission 1*, p. 11.

- the Commonwealth Ombudsman conducts inspections and reports annually to Parliament on law enforcement agencies' exercise of interception powers under the TIA Act.⁷³

2.50 The AGD noted that these 'checks and balances' apply to investigations for a range of criminal offences, including the proposed offence and argue that the 'measures ensure that an individual's privacy is not unduly burdened'.⁷⁴

Committee views and recommendations

2.51 The committee has reflected carefully on the issues raised by submitters and witnesses to this inquiry, in particular, in relation to concerns that the scope of the bill is too broad in capturing preparatory actions. The committee made note of the evidence relating to the broad scope of the proposed offence. It is clear that the bill's primary objective is to capture conduct which is preparatory in nature. While the committee has noted the Law Council's views that the principles relating to criminal liability for the 'attempt' provisions of the Criminal Code should be adopted in this provision, the committee agrees with the AGD that to do so would not achieve the policy objectives of this bill.

2.52 The committee notes that the bill does not intend for the fault element of the proposed offence to be open to uncertainty, and acknowledges the persuasive evidence provided by the Law Council of Australia regarding enhancements to clarity around the fault elements of the proposed offences. It is, however, the view of the committee that the current formulation of the elements of the offence provides a practicable and necessarily flexible solution.

2.53 The committee has considered the definition of 'harm' within the Criminal Code and notes the Law Council's concerns that the term is too nebulous, especially as it would apply to a preparatory offence. The committee also considered the AGD's argument that 'harm', including causing mental harm, is in fact a criminal offence in states and territories. The committee considers that another important aspect of this bill is that the offence is not limited to an intent to engage in sexual activity with a minor but also encompasses an intent to cause harm to a minor.

2.54 The committee also considered the consequential amendment to the TIA Act, which would categorise the proposed offence as a 'serious' offence. This would provide law enforcement agencies with the discretion to apply for a warrant to intercept communications to assist with investigations. It is the committee's view that the TIA Act has the necessary checks and balances to safeguard against unwarranted intrusions on privacy. These safeguards include factors, as prescribed by the TIA, which an independent authority must take into consideration when deciding whether or not to grant a warrant. It is the committee's view that to not proceed with this consequential amendment would hinder the effectiveness and ability of law enforcement agencies to prevent harm to minors prior to it occurring.

73 Attorney-General's Department, *Submission 6*, pp. 6–7.

74 Attorney-General's Department, *Submission 6*, p. 6.

2.55 The committee notes that previous bills were considered by this committee which recommended that the bills not be passed or that further consultation take place prior to its consideration by the Senate. The committee notes that all previous inquiries have supported the policy intent of the bills however had expressed the view that the appropriate balance of protecting minors from online predators, and safeguarding the rights of all Australians, had not been achieved by the previous bills. The committee considers that the current bill is narrower in its application to previous bills and ultimately, achieves the right balance.

2.56 The committee notes the concerns raised by the Scrutiny of Bills Committee in relation to reversing the burden of proof. The committee acknowledges that the burden of proof should only be reversed in limited circumstances and with good justification. Having regard to the advice provided in the Commonwealth Legislation Handbook, the committee is of the view that there is reasonable justification for the burden of proof to be reversed.

2.57 The committee supports the objectives of this bill and makes the following recommendation:

Recommendation 1

2.58 The committee recommends that the Senate pass the bill.

**Senator the Hon Ian Macdonald
Chair**

Dissenting report by the Australian Greens

1.1 The Senate inquiry into the Criminal Code Amendment (Protecting Minors Online) Bill 2017 (the bill) received eight submissions in total. While a number of submissions were supportive of the bill, legal stakeholders raised significant concerns that the bill would not achieve its intended outcomes.

1.2 Despite the evidence provided and concerns raised, the Chair's report has recommended that this bill be passed.

1.3 The Australian Greens are supportive of legislative measures that address protecting children online, but the proposed offences are not necessary or proportionate.

1.4 The Australian Lawyers Alliance in its submission stated:

Preparatory acts for crimes against children are already criminalised. It is thus unclear what the proposed provisions would add in terms of protecting children from harm. The need for this amendment has not been elucidated in the Explanatory Memorandum or second reading speech.¹

1.5 The Law Council of Australia submitted that the conduct the bill seeks to address may already be captured by the offences in section 474.26 and 474.27 of the Criminal Code.²

1.6 The Australian Greens have concerns with the breadth of the offence and that the bill imposes liability too early in the criminal process. It criminalises activities which have no potential to cause harm. In evidence to the inquiry the Law Council stated:

...the Law Council believes that the Criminal Code need not proceed into this new territory. To do so would risk penalising a person for broad intentions which they may never have acted upon or, worse, risks exposing entirely innocent activity to ruinous prosecution.³

Recommendation 1

1.7 The Australian Greens recommend that the bill be rejected by the Senate.

Senator Nick McKim
Senator for Tasmania

1 Australian Lawyers Alliance, *Submission 3*, p. 6.

2 Law Council of Australia, *Submission 1*, p. 7.

3 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 June 2017, p. 8.

Appendix 1

Public submissions

- 1 Law Council of Australia
- 2 Sexual Assault Support Service (SASS)
- 3 Australian Lawyers Alliance
- 4 Queensland Family and Child Commission
- 5 Dr Gregor Urbas
- 6 Attorney-General's Department
- 7 The Carly Ryan Foundation
- 8 Victoria Police

Appendix 2

Public hearings and witnesses

Friday 2 June 2017—Canberra

ALDERMAN, Mr Tony, Manager, Government and Communications, Australian Federal Police

DALEY WHITWORTH, Ms Briony, Acting Senior Legal Officer, Attorney-General's Department

DAVIES, Superintendent Heath, Acting Manager, Victim-based Crime, Australian Federal Police

INVERARITY, Ms Tara, Acting Assistant Secretary, Attorney-General's Department

MOLT, Dr Natasha, Senior Legal Adviser, Law Council of Australia

ODGERS, Mr Stephen, SC, Member, National Criminal Law Committee, Law Council of Australia

RYAN, Ms Sonya, Chief Executive Officer and Founder, Carly Ryan Foundation

SENGSTOCK, Mrs Elsa, Coordinator, Legislation Program, Australian Federal Police

SHEEHAN, Ms Anne, Acting First Assistant Secretary, Attorney-General's Department

