NSWCCL
New South Wales Council for Civil Liberties

NSW Council for Civil Liberties Inc.

Postal address: PO BOX A1386 SYDNEY SOUTH NSW 1235
Office address: suite 203, 105 Pitt Street SYDNEY NSW 2000
Phone: 02 8090 2952 Fax: 02 8580 4633
Email: office@nswccl.org.au Website: www.nswccl.org.au

Submission to the Legal and Constitutional Affairs Committee of the Australian Senate, concerning the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013.

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia.
CCL is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people. To this end CCL attempts to influence public debate and government policy on a range of human rights issues. We try to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected.

We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL thanks the Senate Committee for the opportunity to comment on this bill. We would be happy to address the issues further in person, should the Committee so wish.

We have read submissions that were made to an earlier version of this bill in 2010, and in particular, submissions by John Hatzistergos (then NSW Attorney General) and by the Law Society of South Australia. Although the current bill differs somewhat from the 2010 version, most of the criticisms of the earlier version still apply.

Most importantly, the 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.

Existing Ancillary Offences

Section 11.1 (attempting to commit a crime) of the Criminal Code provides that *conduct* which is merely preparatory for the commission of an offence is not sufficient to prove an attempt. Section 11.2 offences (aiding, abetting, counselling, procuring) *are only complete when the principal offence has occurred.* Section 11.2, section 11.2A (joint commission) and section 11.5 (conspiracy) offences provide that a person cannot be found guilty if they terminate their involvement and attempt to prevent the offence occurring. The prosecution must establish more than preparatory acts--the accused must have moved beyond that stage towards the commission of a substantive offence.

In each case, moreover, the preliminary activity is easily identified as a *preparatory step* in the commission of the principal offence. Further, the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence.

By contrast, in proposed subsection 474.40(1) of this bill, it is proposed that persons who misrepresent their age—in itself legal though sometimes reprehensible—as a preliminary to meeting someone—which is not itself a crime and is not likely to be—should be guilty of an offence and subject to five years imprisonment, *even if the meeting does not occur*. There is something quite extraordinary about this. It is understandable that Senator Xenophon is concerned to try and prevent very serious, even horrible, offences before they occur. But this is not a way to do it.

A series of otherwise legal actions might *sometimes* be enough to demonstrate beyond reasonable doubt that an accused had the intention to commit a crime. But that is not the case here. Lying in order to bring about a meeting may raise suspicions. But that is all.

But in any case, having the intention to commit a crime should not be penalized. People regularly think better of their ill intentions. This bill proposes to condemn them without it being known whether they even *have* criminal intentions.

Grooming Offences and the ages of consent.

For the vast majority of Australians--those living in states other then South Australia and Tasmania, the age of sexual consent is 16.[1] Given the existence of the grooming offences, which deal with grooming by persons over 18 years old of persons who are under 16, it would appear that the point of this bill is precisely to catch relationships with people who are of an age to consent to them. It would apply for instance to an 18-year-old boy who pretends to be older than he is in order to obtain a date with a 17-year-old girl.

For the above reasons, the proposed subsection 474.40 (1) is unreasonable. It should not be supported.

Proposed subsection 474.402)

As argued above, intending to commit a crime is not itself a crime, and should not be made a crime.

If crimes have occurred, they are what a person should be charged with. If they haven't, a person should not be charged for what he or she merely has in mind as a plan.

Given Senator Zenophon's comments in his second reading speech about the tragic and horrible murder of Carly Ryan, it seems likely that what he had in mind is that an older person who seeks a meeting with a younger one and lies about his or her age may have a

[1] In Queensland the age of consent to sodomy is 18.

grave crime in mind. The key word is 'may'. To demonstrate that that is what her or his intention is, and to demonstrate it beyond reasonable doubt, will be impossible in the absence of actual criminal actions.

CCL recommends that the bill be rejected.

Martin Bibby
Executive member and Con-convener of the Police Powers and Civil Rights Subcommittee.
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