

6 June 2017

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator

Criminal Code Amendment (Protecting Minors Online) Bill 2017

Thank you for the opportunity to provide a submission to and appear before the Senate Legal Constitutional Affairs Committee (**the Committee**) on Friday 2 June 2017 as part of the inquiry into the Criminal Code Amendment (Protecting Minors Online) Bill 2017 (**the Bill**).

The Law Council maintains the recommendations of its submission dated 3 May 2017 that the Bill should not be passed in its current form due to a number of problematic features of the proposed section 474.25C *Criminal Code Act 1995* (Cth) (**Criminal Code**) offence (using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16).

However, based on discussions at the hearing, the Law Council understands that the Committee is generally supportive of the Bill. In light of this, the Law Council provides the below suggested drafting amendments to the proposed section 474.25C offence. The adoption of this option may allay some of the concerns raised in the Law Council's initial submission.

The below suggestion uses 474.27 of the Criminal Code as a model but prefers "facilitate" to "making it easier" as a more precise term:

- (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;*
 - (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.*

The Law Council notes that the above formulation would be preferred over the drafting contained in the Bill because it makes clear that there is a fault element not only in respect of the "act" but also with respect to the facilitation (referred to as "preparation"/"planning" in the current formulation). The term "serious harm" is defined in the Dictionary of the Commonwealth Criminal Code to mean:

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.

The Law Council notes that some members of its National Criminal Law Committee continue to have concern with the use of the concept 'harm' and 'serious harm' in the Criminal Code on the basis that these terms are too nebulous, especially in such a preparatory offence. Nonetheless, if the Parliament is minded to enact an offence which includes these concepts as defined in the Criminal Code, the above formulation should be preferred over the current wording in the Bill. An intention to facilitate the causing of harm that is not serious harm should not be subject to a penalty of 10 years imprisonment.

Please contact Dr Natasha Molt, Senior Legal Adviser, Policy Division (02 6246 3754 or at Natasha.molt@lawcouncil.asn.au), in the first instance should you require further information or clarification.

Yours sincerely



Fiona McLeod SC
President