



NEW SOUTH WALES

ATTORNEY GENERAL

Senator the Hon T Crossin
Chair
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

18 MAR 2010

Dear Senator Crossin

Thank you for the opportunity to comment on the *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill* (the Bill). I make the following comments.

In limited circumstances, in order to give law enforcement the ability to intervene before a criminal offence has been committed, it is appropriate for the preparatory steps of an offence to be criminalised. The departure from the law of attempt, which provides that conduct merely preparatory to the commission of an offence is not sufficient to prove an attempt (s. 11.1 of the *Criminal Code 1995* (the Code)) is in this way justified. Examples of such offences include:

- using a carriage service to “groom” persons under 16 years of age (s. 474.27 *Criminal Code Act 1995* (Cth))
- procuring or grooming a child under 16 for unlawful sexual activity (s. 66EB *Crimes Act 1900* (NSW))
- possessing housebreaking implements without lawful excuse (s. 114(1)(b) *Crimes Act 1900* (NSW))
- loitering by a convicted child sex offender near premises frequented by children without lawful excuse (s. 11G *Summary Offences Act 1988* (NSW)).

However, in each of these offences, the intent that the accused had at the time of committing the relevant offence can be easily identified as a preparatory step in the commission of a more serious, and identifiable, offence or form of unlawful activity. Because the law enforcement officers can identify what proposed offence, or type of offence, was to be committed following the preparatory step taken, these offences allow them to intervene at a preliminary stage.

The offences proposed in the Bill however, lack this clear connection between the preparatory step being undertaken with an identifiable criminal intent. In proposed 474.40(3), although this offence must be committed with an intention to commit a further offence, the nature or type of this further offence, is not specified, nor can it be inferred from the preparatory step undertaken.

It is therefore difficult to see how these offences could assist law enforcement authorities with preventing the further commission of a crime.

Moreover, the preparatory step that is to be criminalised, is not necessarily conduct that society regards as deserving criminal sanction: lying about one's age does occur in social situations and amongst young people including on the Internet, for instance on social networking sites such as Facebook or MySpace. There are many reasons why people lie about their age, and although I do not condone such behaviour, many persons who lie about their age do it for a reason other than intending to commit a criminal offence.

It is also unclear how this act reconciles with issues surrounding the age of consent. For instance, the age of consent in NSW is 16 years, however the proposed offences apply to communications between adults and persons under the age of 18 years.

It is also noted that the grooming offences already contained in Part 10.6 of the Code only apply to persons under 16 years of age, and defendants must be over 18 years. It is anomalous that this Bill does not use the same structure.

Moreover, the Bill does not distinguish between misrepresenting one's age by a means of days or months, compared with misrepresenting one's age by a matter of years, or whether or not a person who has misrepresented their age by overstating estimating it, should also be guilty of an offence.

The murder of Carly Ryan was a grave tragedy and I extend my deepest sympathies to her family and friends. The need for Governments, schools, parents, and children and young people, to be ever vigilant in their dealings on the Internet is most powerfully highlighted by this tragic case.

However, the proposals in this Bill have the potential to impact greatly on many Australians, young and old alike, who do not necessarily possess any criminal intent, without providing the sufficient nexus to the more serious offences that the Bill aims to prevent.

Yours faithfully

(John Hatzistergos)