

CHAPTER 2

Key issues

2.1 Submitters and witnesses supported increased protection for children communicating online, including communications with persons above the age of 18 years who are misrepresenting their age for unlawful reasons. However, the committee heard that the Bill is problematic as it does not sufficiently target persons committing unlawful behaviour. Some submitters also questioned the need for the Bill on the basis of existing provisions within the Criminal Code.

Persons targeted by the Bill

2.2 Proposed section 474.40 creates three offences involving online misrepresentation of age to a minor, and there was considerable comment on this provision's omission of an element of intent.

2.3 Bravehearts, a not-for-profit organisation dealing specifically with child sexual assault, told the committee that 'it is always about the intention of the person who is making contact with the child'.¹ In noting the omission, Civil Liberties Australia remarked on the breadth of the provision which, it argued, then captures otherwise innocent misrepresentations:

Under the current draft, you could use the legislation to throw the Wiggles (or any adult actor dressing up on children's TV) into prison for three (3) years. This Bill could close Playschool!²

2.4 Several other submissions made similar comments. For example, South Australia Police pointed out that the Bill does not contain any defence for 'humorous, innocent or erroneous transmissions'.³ Bravehearts suggested that, 'there probably just needs to be some sort of out in the legislation to cover [such situations]'.⁴

2.5 In its submission, Bravehearts argued specifically that the terminology within the Bill needs to more adequately define the concerning behaviour:

...the proposed amendment [section 474.40] needs to more specifically target individuals who misrepresent their age to a minor where the intention

1 Mrs Hetty Johnston, Bravehearts, *Committee Hansard*, 9 March 2010, p. 4. Also see Commander Stephanie Taylor, AFP, *Committee Hansard*, 9 March 2010, p. 11 and p. 12.

2 *Submission 3*, p. 1.

3 *Submission 7*, p. 1. Also see Mr Paul McMahon, *Submission 5*, p. 1; Bravehearts, *Submission 8*, pp 1-2; and NSW Attorney-General, *Submission 9*, p. 2.

4 Mrs Hetty Johnston, Bravehearts, *Committee Hansard*, 9 March 2010, pp 3-4.

is to groom a child in order to commit an offence or to commit an offence against a child. Defining aspects of this might include:

- A person over 18 years of age is misrepresenting his true identity and age, specifically targeting an individual child under the age of 18 years of age; the communication is occurring directly and specifically between the individual adult and the individual child/young person rather than the adult misrepresenting themselves on a general scale to a broad audience.
- On-line communication is occurring on a one-to-one basis over a period of time; that is – the communication that is occurring between the adult and the young person is ongoing.
- The person over 18 years of age is otherwise unknown to the child or has not disclosed that they are known to the child; that is, the adult does not know the child outside of the contact established on-line or where the identity of the adult is, or otherwise would be, known to a child, but is deliberately withheld.⁵

2.6 In spite of the breadth of proposed section 474.40, witnesses agreed that the Bill would provide an important tool for law enforcement agencies.⁶ Ms Susan McLean, an expert in cyber safety gave evidence that:

...this sort of law will be really important because a lot of people who are on the borderline of criminal offending do it if they think they can get away with it or if there is not much chance of them being caught, but having robust legislation in place can in fact prevent some of those peripheral types of people. And of course it is an extra piece of legislation for law enforcement...⁷

2.7 The Australian Federal Police (AFP) concurred with the latter comment, stating that:

...from the AFP's perspective, any legislation that is provided to us that assists us in the work that we do is greatly appreciated.⁸

The need for the Bill

2.8 The second issue raised in some submissions was the necessity for the Bill.⁹ Among these submitters, the Law Society of South Australia referred particularly to sections 474.26-474.28 within the Criminal Code, stating that these provisions

5 *Submission 8*, p. 2.

6 For example, Mrs Hetty Johnston, Bravehearts, *Committee Hansard*, 9 March 2010, p. 3; and Ms Susan McLean, *Committee Hansard*, 9 March 2010, p. 6.

7 *Committee Hansard*, 9 March 2010, pp 6-7.

8 Commander Stephanie Taylor, AFP, *Committee Hansard*, 9 March 2010, p. 10.

9 For example, Law Society of South Australia, *Submission 2*; Civil Liberties Australia, *Submission 3*; and South Australia Police, *Submission 7*.

arguably provide a 'reasonable measure of protection for minors in respect of the activities of adults seeking sexual relationships with them'.¹⁰

2.9 Sections 474.26-474.27 of the Criminal Code currently make it an offence for a sender to use a carriage service to transmit a communication to a recipient with the intention of procuring, or making it easier to procure, the recipient to engage in, or submit to, sexual activity with the sender.

2.10 'Sexual activity' is defined in section 474.28 of the Criminal Code as:

- (a) sexual intercourse as defined in section 50AC of the *Crimes Act 1914*; or
- (b) an act of indecency as defined in section 50AB of that Act; or
- (c) any other activity of a sexual or indecent nature that involves the human body, or bodily actions or functions.

The activity referred to in paragraph (c) need not involve physical contact between people.

2.11 At the public hearing, several questions were directed toward the requirement for intent in sections 474.26 (procurement) and 474.27 (grooming). Witnesses were asked whether the grooming provision covers situations where an adult is misrepresenting his or her age to a minor for the purpose of gaining the child's trust and where there is, as yet, no question of sexual or prurient intent.

2.12 The representative from Bravehearts considered this a 'really critical issue',¹¹ indicating that the Criminal Code does not cover an intention to groom:

...that is where the legislation is failing, at least from our point of view. Offenders are able to run rings around law enforcement somewhat. The grooming process involves an initial contact with the child that is then built upon. There is an ongoing communication between an adult purporting to be a child and the child themselves. I think there has to be a point at which law enforcement agencies can intervene right there.¹²

2.13 Ms McLean agreed that the offences created by the Bill would enable law enforcement agencies to pre-empt unlawful behaviour¹³ and took issue with the requirement in the existing provisions – sections 474.26 and 474.27 – to show sexual intent:

...many people will engage with a young person perhaps to see what happens or to see if they can or to see what comes out of it. It might not start off as sexual, or vice versa.

10 *Submission 2*, p. 1.

11 Mrs Hetty Johnston, Bravehearts, *Committee Hansard*, 9 March 2010, p. 3.

12 Mrs Hetty Johnston, Bravehearts, *Committee Hansard*, 9 March 2010, p. 4.

13 *Committee Hansard*, 9 March 2010, p. 9.

...

When it comes to having to prove that it was for sexual procurement and you have no evidence or you have not got to the point where they may be exchanging images of child pornography or engaging in grooming behaviours that are normalising this, but you clearly know the intention because you can tell by the communication—it may be something like 'run away with me', 'play truant from school' and things like that to try to get the child to do something that is against his parent's wishes—this type of legislation will be a good addition to what we already have.¹⁴

2.14 An AFP witness acknowledged that officers have encountered cases of older persons pretending to be younger persons in communications with minors and where there appears to be neither any innocent explanation nor any suggestion of sexual intent. The witness told the committee that proving intent is vital in the prosecution of an offence:

It will not be sufficient just to suggest to the court that we have been able to show that there has been contact; we actually have to prove the intention of the person that is actually grooming or involved with the child at the time.¹⁵

2.15 The Bill will create offences of absolute liability.¹⁶ However, the AFP did not appear convinced that the Bill would overcome the present difficulties of proving intent or that it would ultimately prove useful in the prosecution of serious offences. The AFP representative did agree that the Bill would give the agency scope for early investigation and intervention:

Any legislative tool that we have that is going to assist us in these investigations is very useful, but the difficulty is in proving intention and proving what the purpose might be for that engagement. That is where we are probably going to have some difficulty for the prosecution. If it were simply for an intervention or for a prevention, then the legislation would be appropriate...the tools supporting the investigation of something far more serious in nature might be a bit lacking.

...

If the offence was, strict and absolute, that the person was lying about their age and we could prove that then obviously there would be some scope for us to move in that realm. But if we are talking about grooming a child for some kind of serious offence being committed against a child, lying about their age is not going to move us along.¹⁷

2.16 The NSW Attorney-General agreed with these comments. In his submission, the NSW Attorney-General stated that, 'in limited circumstances, in order to give law

14 *Committee Hansard*, 9 March 2010, p. 7.

15 Commander Stephanie Taylor, AFP, *Committee Hansard*, 9 March 2010, p. 10.

16 Proposed subsection 474.41(1).

17 Commander Stephanie Taylor, AFP, *Committee Hansard*, 9 March 2010, pp 11-12.

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'.¹⁸ The submission cited examples of offences which were stated to be a justifiable departure from the law of attempt. However, the NSW Attorney-General went on to describe the Bill as lacking the relevant nexus between preparatory steps and an identifiable criminal intent:

...in each of [the cited] 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.

...

The offences proposed in the Bill however, lack this clear connection between the preparatory step being undertaken with an identifiable criminal intent.

...

It is therefore difficult to see how these offences could assist law enforcement authorities with preventing the further commission of a crime.¹⁹

2.17 The NSW Attorney-General added, 'moreover, the preparatory step that is to be criminalised, is not necessarily conduct that society regards as deserving criminal sanction'.²⁰

2.18 Although the language and structure of the Bill mirrors the existing procurement and grooming offences, one submitter noted a significant difference: paragraph (c) of the definition of 'sexual activity' within the Criminal Code is inconsistent with paragraph 474.40(2)(c) of the Bill in that the latter captures physical contact only.

2.19 The Law Society of South Australia submitted that the Criminal Code recognises that an unlawful relationship can occur between parties that does not involve a physical meeting or physical contact.²¹ This view was supported by Bravehearts who told the committee:

...quite often [legislation] is pretty much targeted at physical contact with the child after a grooming process, whereas our experience tells us that probably more often, or at least as often, offenders are engaging young people over the net to provide them with photos or perform acts in front of

18 *Submission 9*, p. 1.

19 *Submission 9*, pp 1-2.

20 *Submission 9*, p. 2.

21 *Submission 2*, p. 1.

cameras and whatnot. That is not about meeting a child, but it is still about sexually assaulting a child via exploitation...²²

2.20 The Law Society of South Australia suggested that the word 'physically' be removed from paragraph 474.40(2)(c)²³ and was prepared to support the Bill (with amendments). On the other hand, the South Australia Police supported the existing procurement and grooming provisions, which were to be amended by the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010.²⁴ The South Australia Police considered that those amendments would simplify and expand the existing procurement and grooming offences.²⁵

2.21 A representative from the Attorney-General's Department (Department) also commented:

...we already have offences in Commonwealth legislation both for with an intention to procure someone under 16 for sexual activity as well as for a broader grooming offence where the intention is just to make it easier to procure. That covers situations that are broader than just misrepresentation of age. It can cover any communication for any purpose as long as the ultimate outcome is to make it easier to procure.²⁶

Empirical data regarding online misrepresentation of age

2.22 Statistics provided to the committee indicate that the incidence of Australian children communicating online is extremely high. In 2009, the Australian Bureau of Statistics reported that, in the 12 months prior to April that year:

...an estimated 2.2 million (79%) children accessed the Internet either during school hours or outside of school hours. The proportion of males (80%) accessing the Internet was not significantly different from females (79%). The proportion of children accessing the Internet increased by age, with 60% of 5 to 8 year olds accessing the Internet compared with 96% of 12 to 14 year olds...A higher proportion of children used the Internet at home (92%) than at school (86%).²⁷

22 Mrs Hetty Johnston, Bravehearts, *Committee Hansard*, 9 March 2010, p. 4.

23 *Submission 2*, p. 1.

24 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, 18 March 2010. That bill was passed in the Senate on 18 March 2010 and received Royal Assent on 14 April 2010 (Act No. 42 of 2010).

25 *Submission 7*, p. 1.

26 Ms Sarah Chidgey, Assistant Secretary, AGD, *Committee Hansard*, 9 March 2010, p. 15.

27 Australian Bureaus of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/4901.0~Apr+2009~Main+Features~Internet+use+and+mobile+phones?OpenDocument> (accessed 21 June 2010).

2.23 In the United States of America, the Polly Klaas Foundation has inquired further into the Internet habits of teens (ages 13 to 18) and tweens (ages 8 to 12). Its 2005 survey included the following findings:

- online teens frequently communicate virtually with someone they have never met: 54% have done so using instant messaging, 50% via email, and 45% in a chat room;
- nearly one third of online teens (30%) said they have talked about meeting someone whom they have only met through the Internet;
- one in four (27%) said they have talked online about sex with someone they never met in person, and nearly one in five (19%) reported knowing a friend who has been harassed or asked about sex online by a stranger; and
- nearly one in eight (12%) found that someone online was an adult pretending to be much younger.²⁸

2.24 In relation to the Internet habits of Australian teens and tweens, Ms McLean advised that there is no Australian data comparable to that compiled by the Polly Klaas Foundation:

There is really good data coming out of Australia now in relation to cyber bullying. There is not really good data coming out of Australia in relation to online sexual solicitation and grooming of children...[W]e have a smaller population, so we are not going to see the same numbers of kids.²⁹

2.25 Ms McLean also alluded to a popular misconception that grooming occurs in America, or elsewhere, but not in Australia:

Certainly whilst cyberbullying itself is the major online safety consideration for young people here in Australia, by virtue of the fact of the way kids use technology, there is still going to be a percentage of young Australian children who are groomed. We know they are groomed by people within Australia. We certainly know of cases where Australian kids have been groomed by people in other parts of the world.³⁰

Committee view

2.26 The committee strongly supports the protection of Australian children who communicate online, whether that protection is required due to cyberbullying or to sexual predators. The Bill therefore highlights and attempts to address an important

28 Polly Klaas Foundation, 'Topline Findings from Omnibuzz Research', 2005. <http://www.pollyklaas.org/internet-safety/internet-pdfs/PollingSummary.pdf> (accessed 21 June 2010).

29 *Committee Hansard*, 9 March 2010, p. 8.

30 *Committee Hansard*, 9 March 2010, p. 9.

and potentially far-ranging issue affecting families, and the Australian community as a whole.

2.27 However, the committee heard from most contributors to the inquiry that the Bill is problematic. Some contributors were critical of the Bill for its failure to incorporate an element of intent, a problem complicated by the omission of any allowance for 'innocent' online communications. Others argued that, essentially, the Bill duplicates and does not improve on the existing procurement and grooming provisions relevant to carriage service communications (sections 474.26 and 474.27 of the Criminal Code, respectively). In relation to the latter argument, the fundamental point of contention was the existing intent requirement.

2.28 Some submissions and witnesses considered the requirement to prove sexual intent as not very helpful in cases where persons misrepresenting their age to minors online are doing so in order to establish and develop the trust of the minor. These contributors considered that the Bill covers pre-grooming behaviour, providing law enforcement agencies with an opportunity for early intervention and prevention.

2.29 In contrast, others told the committee that the requirement to prove intent continues to exist for the more serious offences (such as procurement and/or grooming, as opposed to misrepresentation of age). While the Bill could assist with early intervention or prevention, it would have this limited effect only.

2.30 The committee notes that few submissions were received for this inquiry, none of which were lengthy. While the committee therefore commends the broad objective of the Bill, insufficient information was received during the inquiry to allow the committee to make a fully informed decision to recommend the passage of the Bill (with or without amendments). In particular, the committee has reservations as to how precisely the Bill would interact with or complement existing provisions in the Criminal Code, and considers that more information is required in this regard.

2.31 In accordance with its views expressed above, the committee endorses the creation of the Joint Select Committee on Cyber Safety on 25 February 2010, the terms of reference for which include: the nature, prevalence, implications of and level of risk associated with cyber safety threats (such as abuse of children online – cyber-bullying, cyber-stalking and sexual grooming); exposure to illegal and inappropriate content; and the analysis of information on achieving and continuing world's best practice safeguards.³¹ The committee anticipates that a detailed and focussed examination of these issues will ultimately achieve similar objectives to the Bill, and awaits with interest the outcomes of that inquiry.

31 Journals of the Senate, No. 113-9 March 2010, pp 3259-3259.

Recommendation 1

2.32 The committee recommends that the Senate should not pass the Bill.

Senator Trish Crossin

Chair

