

MINORITY REPORT BY SENATOR XENOPHON

Introduction

1.1 The *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010* (Bill) intends to protect those under the age of 18 from internet predators over the age of 18 who lie about their age in order to establish a relationship with the minor, to potentially meet them and who may intend to commit an offence.

1.2 While there are existing provisions for grooming under the Criminal Code, this Bill is designed to intervene in cases before any grooming takes place. That is, it is the lie to the minor by an adult that becomes the offence.

1.3 The Bill also aims to provide police at state, territory and federal levels with additional powers that could allow them to intervene at an early stage to protect the child from potential internet predators.

Background

1.4 The Bill was introduced following the murder of 15 year old South Australian teenager Carly Ryan on 19 February 2007.

1.5 Carly met '20 year old' 'Brandon Kane' online in the middle of 2006 and in the months following told family and friends she had 'fallen in love with him' and believed that he loved her too.

1.6 Her mother, Sonya Ryan, later told media:

She [Carly] said Brandon was really cute and that she really liked him.

She was like a giddy teenager in love - really happy, really light and really excited.¹

1.7 After a few weeks 'chatting' with 'Brandon', Carly also began communicating online with 'Brandon's' supposed adopted father.

1.8 However, 'Brandon' and 'Shane' were, in fact, constructed identities by the same person – 47 year old Garry Francis Newman who, it was later revealed during the court process, had maintained in excess of 200 fake online identities over a number of years to communicate with teenage girls, seeking to have sex with them.

1.9 In January 2010, Garry Francis Newman was found guilty of Carly Ryan's murder and has since been sentenced for a minimum of 29 years in prison.

1 Adelaide Advertiser, *Carly Ryan: A loving girl who fell prey to an online predator*, 23 January 2010.

Misrepresentation of Age to a Minor

1.10 Although lying about one's age is not uncommon in the general community, misrepresenting one's age in order to gain someone's trust is deceptive and may suggest that that person intentionally seeks to mislead the other, possibly for malicious intent.

1.11 After all, for what reason would a 47 year old lie to a 14 year old about his age by some 30 years, other than to gain her trust in the hope that she'll take him into her confidences, as was the case with Carly Ryan.

1.12 The Bill is intended to deter those adults who would otherwise seek to misrepresent their age to a minor with the intention of subsequently grooming them for sexual activity.

1.13 In her submission to the committee, cyber safety expert and director of Cyber Safety Solutions, Ms Susan McLean, refers to a 2005 survey conducted in the United States of 742 teenagers as an example of how common it is for teenagers to be misled online:

54 percent of teens admitted communicating with someone they've never met using an Instant Messaging program, 50 percent via email and 45 percent in a chat room.

16 percent of all respondents or one in eight youth aged 8 to 18 discovered that someone that they were communicating with online was an adult pretending to be much younger.²

1.14 Ms McLean goes on to explain that, given the ease with which personalities can be created online, more needs to be done to ensure that:

There is no way to accurately age verify any internet user, the same way that there is no way for anyone using the internet to really know who they are engaging with unless of course they are known to them in real life.

Adults, who for a variety of reasons, go online pretending to be a likeminded teen, rarely have honest intentions.³

1.15 While it can be argued that not all online sex predators lie about their age, and not all those who lie about their age are online sex predators, the Bill seeks to reduce the possibility of grooming from occurring by making it illegal in the first place for an adult to misrepresent their age to a minor.

1.16 Ms McLean also stated during the Senate committee hearing:

Ms McLean—...[T]his 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

2 *Submission 6, p. 3.*

3 *Submission 6, p. 3.*

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.⁴

1.17 The Bill includes three levels of offences and related penalties for adults misrepresenting their age to a minor – the misrepresentation in and of itself, misrepresentation with the intention of meeting the recipient physically, and misrepresentation with the intention of committing an offence.

1.18 In this way, the Bill allows police to recognise the different motives behind the misrepresentation and how these may be considered as preparatory to grooming.

1.19 It also means that an individual can be 'flagged' with police as exhibiting behaviours which may lead to grooming offences and therefore can be monitored by Police to ensure that the more serious offence of grooming does not take place.

1.20 During the Senate committee hearing, Ms McLean argued that this Bill would enable police to pre-empt situations in the interest of children at risk:

Ms McLean—I think you would be able to pre-empt. I will give you an example. Mrs Citizen comes into the police station and says, 'I've been checking my child's chat logs and I am concerned about the content.' It might not be anything sexual; it is just that the mum is concerned. Her daughter talks of Bill, 17, whom she has just met online, and he lives whatever.

If the police looked into that, so started an investigation, and clearly found that the person at the other end was pretending to be a young person—and it had not gone to that sexual space yet, and who is to say whether it would or it would not; you assume it has—I think it would give them an extra piece of legislation in their arsenal.

They would be able to prevent some of this, whereas at the moment they have to wait until the sexual contact or content has occurred.⁵

1.21 However, there are concerns about resources available to state/territory and federal police to investigate such matters.

1.22 Ms McLean has worked in the area of cyber safety since 1994, initially as part of the Victorian Police Force where, in 2006, she was appointed Victoria's first 'cyber-cop':⁶

4 *Committee Hansard*, 9 March 2010, p. 6.

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

6 *The Age*, *Cyber-crime cases ignored by untrained police*, 7 March 2010.

I would average one call every 14 days from a mother trying to report cyber-bullying or grooming [to police] only to be told 'it's not our problem' and to go to the federal authorities.

Cyber-crime [at a state level] is not a focal point. It was all in the too hard basket. They will tell you there is an e-crime unit, but this is for high-level fraud, stolen identities, major crime. It is not about cyber-bullying, stalking, harassing. There is no expertise and they don't see it as their problem.⁷

1.23 The Bill aims to provide police with additional powers to intervene in cases brought to their attention, where specific grooming offences may not yet have taken place.

1.24 Victoria Police, in its submission to the committee, said:

Victoria Police supports the amendments contained within the draft Bill and believes that their implementation will allow its members and officers to more effectively protect children from online exploitation.⁸

1.25 Ms Hetty Johnson, President of Bravehearts, also saw the Bill as useful for Police:

Senator XENOPHON—In broader terms, would you look at it as: is this a tool for the police to be able to keep tabs on and warn people who do not have an innocent explanation for communicating with children, for posing as children when they are clearly adults?

Ms Johnston—Yes, I think it is an incredibly important tool for police.⁹

Response to criticisms of the Bill

1.26 Under the provisions of the Bill, there are clear defences to protect those who make innocent remarks about their age which could be considered misrepresentation – such as a grandmother saying she'll be '21 again' or, as some submitters to the inquiry claimed might occur as an unintended consequence of the Bill, the Wiggles could be held liable for 'pretending' to be children.

1.27 In response to this, Susan McLean argued during the Senate hearing that:

Ms McLean—When police are looking for evidence in relation to the laying of charges down the track they are going to look at the content of the communication. My submission would be that, if grandma were chatting to the grandchild, it would be very clear in that regard that that is not a person out there who is trying to groom a young person.

7 The Age, *Cyber-crime cases ignored by untrained police*, 7 March 2010.

8 *Submission 1*, p. 1.

9 *Committee Hansard*, 9 March 2010, p. 4.

With any sort of legislation, police have to have the evidence before charges are going to be laid. If all you have got is a chat that appears to be between grandma and grandchild then there is no way a prosecution is going to eventuate anyway.¹⁰

1.28 In addition, such innocent incidences and other examples are clearly covered within the defences of the Bill:

474.42 Defences to offences against section 474.40

(1) It is a defence to a prosecution for an offence against section 474.40 that the defendant believed at the time the communication was transmitted that the recipient was not under 18 years of age.

Note: A defendant bears an evidential burden in relation to the matter in this section, see subsection 13.3(3).

(2) In determining whether the defendant had the belief referred to in subsection (1), the jury may take into account whether the alleged belief was reasonable in the circumstances.

(3) A person is not criminally responsible for an offence against section 474.40 because of engaging in particular conduct if the conduct:

- (a) is of public benefit; and
- (b) does not extend beyond what is of public benefit.

In determining whether the person is, under this subsection, not criminally responsible for the offence, the question whether the conduct is of public benefit is a question of fact and the person's motives in engaging in the conduct are irrelevant.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

(4) For the purposes of subsection (3), conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:

- (a) enforcing a law of the Commonwealth, a State or a Territory; or
- (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
- (c) the administration of justice; or
- (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.

(5) A person is not criminally responsible for an offence against section 474.40 if:

- (a) the person is, at the time of the offence, a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; and

- (b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

Note: A defendant bears an evidential burden in relation to the matter in this section, see subsection 13.3(3).

1.29 It is when the misrepresentation is between an adult and a minor and is clearly with the purpose of gaining that child's trust in order to pursue an inappropriate relationship that the provisions under this Bill would apply.

1.30 As Ms McLean told the Senate Committee:

Ms McLean—...[T]he difference is when someone does it with the intent to misrepresent their age and to make the young person believe that they are dealing with a young person.

My grandmother told me that she was 21 forever. Was she trying to misrepresent her age to me? No. That is just what a lot of old people do—you know, 'I'm 40 again.' I think there is a defined difference between that and what we are talking about here.

With any sort of legislation, police have to have the evidence before charges are going to be laid. If all you have got is a chat that appears to be between grandma and grandchild then there is no way a prosecution is going to eventuate anyway.¹¹

1.31 The defences contained within the Bill also address cases when the adult cannot reasonably know the person they were communicating with is a minor, for example, if the teenager pretends to be over 18 years of age.

1.32 Concerns around the practicality of applying the Bill have also been raised in terms of how it would actually assist police to intervene in cases and how police would be notified of instances of misrepresentation by an adult to a minor about age.

1.33 This Bill could better assist police in the protection of minors in instances when they receive notice from a member of the public who says, for example, that they've become aware their daughter has befriended a stranger online who says he's of the same age but they don't believe he is for whatever reason.

1.34 This Bill should reduce the incidence of online sex predators and provide authorities with a useful tool to monitor such behaviours.

Conclusion

1.35 The intent of this Bill is to further protect those under the age of 18 from internet predators by making the first attempt by an unknown adult towards a child illegal.

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

1.36 The simple fact is that some predators lie about their age in order to garner a minor's trust. They pretend to be the same age, to attend a nearby school, to like the same movies, all with the intention of convincing the minor that they are the same age as them and therefore can be trusted.

1.37 This Bill would make this act illegal, and would have the effect of either deterring persons from doing so or would give police additional options to investigate possibly suspicious characters.

Recommendation 1

1.38 That the Bill be passed with amendments to reflect submissions by child protection and cyber safety groups to ensure police are able to act against adults who misrepresent their age and other related information to a minor online.

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