

The Senate

---

Legal and Constitutional Affairs  
Legislation Committee

---

Criminal Code Amendment (Misrepresentation of Age to a  
Minor) Bill 2010

June 2010

© Commonwealth of Australia

ISBN: 978-1-74229-264-9

This document was printed by the Senate Printing Unit, Department of the Senate,  
Parliament House, Canberra.

## **MEMBERS OF THE COMMITTEE**

### **Members**

Senator Patricia Crossin, **Chair**, ALP, NT

Senator Guy Barnett, **Deputy Chair**, LP, TAS

Senator David Feeney, ALP, VIC

Senator Mary Jo Fisher, LP, SA (Until 11 March 2010)

Senator Scott Ludlam, AG, WA

Senator Gavin Marshall, ALP, VIC

Senator Stephen Parry, LP, TAS (From 11 March 2010)

### **Participating Members**

Senator Nick Xenophon, IND, SA

### **Secretariat**

Ms Julie Dennett	Secretary
Ms Monika Sheppard	Senior Research Officer
Ms Kate Middleton	Executive Assistant

Suite S1.61	Telephone: (02) 6277 3560
Parliament House	Fax: (02) 6277 5794
CANBERRA ACT 2600	Email: <a href="mailto:legcon.sen@aph.gov.au">legcon.sen@aph.gov.au</a>



# TABLE OF CONTENTS

<b>MEMBERS OF THE COMMITTEE .....</b>	<b>iii</b>
<b>CHAPTER 1 .....</b>	<b>1</b>
<b>Introduction and Overview .....</b>	<b>1</b>
Summary of key amendments .....	1
Conduct of the inquiry .....	2
Acknowledgement .....	2
Scope of the report.....	2
Note on references .....	2
<b>CHAPTER 2 .....</b>	<b>3</b>
<b>Key issues.....</b>	<b>3</b>
Persons targeted by the Bill.....	3
The need for the Bill.....	4
Empirical data regarding online misrepresentation of age.....	8
Committee view.....	9
<b>ADDITIONAL COMMENTS BY LIBERAL SENATORS .....</b>	<b>13</b>
<b>MINORITY REPORT BY SENATOR XENOPHON .....</b>	<b>15</b>
Introduction .....	15
Background.....	15
Misrepresentation of Age to a Minor .....	16
Response to criticisms of the Bill.....	18
Conclusion .....	20
<b>APPENDIX 1 .....</b>	<b>23</b>
<b>SUBMISSIONS RECEIVED.....</b>	<b>23</b>

**APPENDIX 2 .....25**  
**WITNESSES WHO APPEARED BEFORE THE COMMITTEE .....25**

# **RECOMMENDATIONS**

## **Recommendation 1**

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





# CHAPTER 1

## Introduction and Overview

1.1 On 4 February 2010, the Senate referred the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010 (Bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 30 June 2010.<sup>1</sup>

1.2 The Bill was introduced in the Senate as a private senator's bill by South Australian Senator Nick Xenophon. The impetus for the Bill was the case of Carly Ryan, a 15-year old South Australian who was murdered in 2007 by a 50-year old man who, together with his son, had posed online as a 20-year old.

1.3 The Explanatory Memorandum (EM) explains that the Bill is designed to protect those under the age of 18 years from internet predators who intentionally lie about their age so as to gain the trust of minors.<sup>2</sup> Senator Xenophon told the Parliament that existing laws are not achieving this purpose:

Currently in many jurisdictions police have to prove a sexual predator has a prurient interest in misrepresenting their identity.

This can be a difficult task and can result in police being unable to act, even when they believe there is a threat.

This bill would remove any doubt. If an adult knowingly lies to a minor about their age online, they have broken the law.<sup>3</sup>

### Summary of key amendments

1.4 The Bill amends Subdivision C of Division 474 (Telecommunications Offences) of the Schedule to the *Criminal Code Act 1995* (Criminal Code). The six-page Bill proposes to insert three substantive sections into the Criminal Code:

- creating new offences for the online misrepresentation of age to persons under 18 years of age;
- clarifying the provisions relating to those offences; and
- providing a limited number of defences to those offences.<sup>4</sup>

---

1 Journals of the Senate, No. 108-4 February 2010, p. 3143.

2 Explanatory Memorandum, p. 1.

3 *Senate Hansard*, 3 February 2010, p. 62.

4 Proposed sections 474.40-474.42.

1.5 Due to the content of submissions and evidence received by the committee, the inquiry focussed primarily on those provisions creating the new offences. These are contained in proposed section 474.40.

1.6 Proposed subsection 474.40(1) makes it an offence for a person (the sender) to use a carriage service to transmit a communication to another person (the recipient) with the intention of misrepresenting the sender's age in circumstances where the recipient is someone who is, or who the sender believes to be, under 18 years of age and where the sender is at least 18 years of age.

1.7 Proposed subsections 474.40(2) and 474.40(3) extend this offence by, respectively, adding the element of an intention to make it easier for the sender to physically meet the recipient and the element of an intention to commit an offence (other than that proposed by subsection 474.40(1)).

### **Conduct of the inquiry**

1.8 The committee advertised the inquiry in *The Australian* newspaper on 10 February 2010 and 24 February 2010. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 57 organisations and individuals inviting submissions.

1.9 The committee received nine submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.10 The committee held a public hearing in Canberra on 9 March 2010. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the Hansard transcript are available through the internet at <http://www.aph.gov.au/hansard>.

### **Acknowledgement**

1.11 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

### **Scope of the report**

1.12 Chapter 2 discusses the key issues raised in submissions and evidence.

### **Note on references**

1.13 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the proof *Hansard*: page numbers may vary between the proof and the official *Hansard* transcript.

# 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'.<sup>1</sup> 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!<sup>2</sup>

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'.<sup>3</sup> Bravehearts suggested that, 'there probably just needs to be some sort of out in the legislation to cover [such situations]'.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> 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...<sup>7</sup>

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.<sup>8</sup>

## **The need for the Bill**

2.8 The second issue raised in some submissions was the necessity for the Bill.<sup>9</sup> 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'.<sup>10</sup>

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',<sup>11</sup> 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.<sup>12</sup>

2.13 Ms McLean agreed that the offences created by the Bill would enable law enforcement agencies to pre-empt unlawful behaviour<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

2.15 The Bill will create offences of absolute liability.<sup>16</sup> 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.<sup>17</sup>

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'.<sup>18</sup> 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.<sup>19</sup>

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'.<sup>20</sup>

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.<sup>21</sup> 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...<sup>22</sup>

2.20 The Law Society of South Australia suggested that the word 'physically' be removed from paragraph 474.40(2)(c)<sup>23</sup> 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.<sup>24</sup> The South Australia Police considered that those amendments would simplify and expand the existing procurement and grooming offences.<sup>25</sup>

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.<sup>26</sup>

### **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%).<sup>27</sup>

---

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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup>

## 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.<sup>31</sup> 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**



# ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 Liberal senators endorse the Chair's report and strongly support the objective of the Bill, which is to protect persons under the age of 18 years from internet predators who intentionally lie about their age so as to gain the trust of minors.<sup>1</sup>

1.2 Ms Susan McLean indicated that online grooming of young people occurs within Australia,<sup>2</sup> notwithstanding the lack of readily available data. Unfortunately, the veracity of this evidence was demonstrated during the course of the inquiry with the reported murders of two more young people:

- in Queensland, eight-year old Trinity Bates was murdered by a 19-year old man who had befriended her parents on the social networking site, Facebook; and
- in New South Wales, 18-year old Nona Belomesoff was murdered by a 20-year old stranger who she had met on Facebook and who allegedly lured her to her death.

1.3 These tragedies serve as a warning not only to young people communicating online but also to persons in positions of responsibility and persons with the ability to institute protective measures.

1.4 While the problem identified and sought to be addressed in the Bill (online grooming) is a highly commendable objective, it is part of a much larger problem.

1.5 The Federal Parliament has, through the creation of the Joint Select Committee on Cyber Safety, recognised that cyber safety is a contemporary and critical issue concerning young people online – an issue that requires consideration, action and support on a much broader scale than is envisaged in the Bill. Liberal senators strongly endorse the work of that committee, noting its comprehensive and targeted terms of reference.

1.6 However, cyber safety is only part of a much broader issue: how do we protect young people from those persons who would prey upon their innocence and trust? Whether through enhanced cyber safety, designed to educate and instil safe practices online, or through an appropriate and effective classification system for films and computer games, it is incumbent on all members of the Australian community to minimise and thwart the efforts of those persons who would prey upon a young person.

---

1 Explanatory Memorandum, p. 1.

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

1.7 While strongly supporting the objective of the Bill, Liberal senators consider that a much broader and effective strategy is required to appropriately protect young people in the Australian community. For this reason, Liberal senators do not support the Bill in its current form.

**Senator Guy Barnett**

**Senator Stephen Parry**

**Deputy Chair**

# 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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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':<sup>6</sup>

---

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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

## 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.<sup>10</sup>

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.<sup>11</sup>

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.**

**Senator Nick Xenophon  
Independent Senator for South Australia**



# **APPENDIX 1**

## **SUBMISSIONS RECEIVED**

<b>Submission Number</b>	<b>Submitter</b>
1	Victoria Police
2	The Law Society of South Australia
3	Civil Liberties Australia
4	Northern Territory Police
5	Mr Paul McMahon
6	Ms Susan McLean
7	South Australia Policing
8	Bravehearts
9	New South Wales Attorney-General





**APPENDIX 2**

**WITNESSES WHO APPEARED  
BEFORE THE COMMITTEE**

CHIDGEY, Ms Sarah, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department

JOHNSTON, Mrs Hetty, Founder and Chairperson, Bravehearts

McLEAN, Ms Susan, Private capacity

ORANGE, Ms Kate, Senior Legal Officer, Criminal Law and Law Enforcement Branch, Attorney-General's Department

TAYLOR, Commander Stephanie, Australian Federal Police

WHOWELL, Mr Peter, Manager, Government Relations, Australian Federal Police