

The Stranger Danger

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Any adult who uses a carriage service (eg internet chat rooms, social networking sites) to groom anyone under the age of 16 for sexual activity is guilty of an offence under Federal, State and Territory laws.¹ Online grooming is when adults use the internet to prepare a child for sexual contact often with the use of child pornography.² The government's internet policy is based on keeping children safe from exploitation. The internet allows children to reinvent themselves, create an online personality, but it also makes them vulnerable to be exposed to pornography and dangerous online relationships.

The fact being an adult is an element of the offence means 'sexting' may become an issue when the offender is 18 and the victim is 15.³ This could expose underage victims who send nude or semi-nude images of themselves through mobile phone or similar devices to charges of child pornography offences.⁴ This gap in the legislation has not been seriously dealt with and could put teenagers on the sex offenders' registry, especially when those in the 18-21 range represent twenty to thirty percent of the non-imprisoned people soliciting minors.⁵

No sexual contact is required to prove the charge. Offenders pose as children or friendly adults to procure children, and if they fail they try again with a new identity. Police create children who exist wholly online to entice offenders, or assume the identity of real child for the same purpose.⁶ This procedure gathers evidence needed to prosecute as the police cannot investigate every chat room and Facebook page as this would require the victims' or parents' active involvement.⁷ Often online grooming can involve police from other countries as the actual investigators and undercover operatives. This process does entrap the offenders but this has not been a successful basis to dismiss charges or to mitigate sentence, even being approved on a Biblical basis.⁸

The prosecution does need to prove the accused knew they were speaking to a child.⁹ Considering the nature of the internet chat room, offenders would only know the age of children from the photographs they provide. However, there is a requirement that the accused intended to meet with the victim for the purpose of engaging in sexual activity.¹⁰ This may allow a basis for

a 'fantasy' defence where interactions are purely role-play but no intention can be found.¹¹ But any interaction about where the victim may live or offers to pay transport may go to proving intention to meet.¹² To capture online child grooming is difficult if parents or police are not suspicious, and a program identifying particular code and keywords could mean too much data for investigators to trawl from public internet relay chat rooms.¹³

The keywords and codes used in these interactions may require expert understanding both to show that anyone would reasonably believe this was grooming, and for police to fully convince offenders they are the children they pose as. Prosecutions have failed when the false identity spoke in dated teenage slang, allowing the defence to prove they honestly believed the complainant was lying about their age.¹⁴ Posing as children requires police to both use and understand the constantly shifting slang of the modern online child. Without knowing the slang, police chances of arresting offenders goes down. However, this defence of honest and reasonable mistake may not be available in some jurisdictions, but the 'fantasy' evidence may still go to proving there was no intention to meet.¹⁵

Proving this intention to meet prevents early intervention by authorities to stop the interactions before sexual activities are discussed.¹⁶ The Commonwealth has proposed a Bill criminalising lying about one's age online to a minor to prevent any chance that rape and murder could occur if the parties meet.¹⁷ Unlike online grooming, this would operate when the offender is misrepresenting their age to the victim who only knows them online. However, criminalising this mere action may be incompatible with the law of attempt and provides no defences to capture the innocent communications that could be made in these situations.¹⁸ But the Bill's removal of intent creating an absolute or strict liability offence may not be justified even when grooming could be considered a new social evil, especially when almost any offence could flow from the lie.¹⁹

The Legal and Constitutional Affairs Legislation Committee recommended the Bill not be passed due to it removing the requirement to prove mens rea.²⁰ Making

the laws strict liability would be justified considering the suspicious behaviour behind adults lying online to teenagers about their age. The aim to deter crime would still require policing social network websites and chat rooms, and determining if someone is pretending to be a child would require a new range of software as well as easier communication with social networking sites to ensure warrants for data can be processed in time for it to be successful.²¹ As many of the conversations are not yet sexual or inappropriate in nature, proving reasonable belief for a warrant to gather evidence of whether someone is lying about their age would be hard to find in the circumstances. It would follow that the chance of the eventual crime occurring is rather reduced.

To help prevent grooming, the Australian Federal Police want a dedicated law enforcement expert from FaceBook. Australian police find it incredibly difficult to contact these organisations to serve warrants or request information be taken down, especially when FaceBook says it already provides sufficient help to authorities.²² However, preventing online grooming may require educating users to what is appropriate conversation on the internet and to report any solicitations if they occur, or at least having systems to report abuse.

Without an intention to groom, police may rely on the dissemination of pornography to charge offenders. The Internet has allowed people to share child pornography, organise their attacks, or privately lure their victims from anywhere in the world.²³ They could be prosecuted even when images of child pornography are computer-generated or mere cartoon depictions meaning no classification process of the material needs to have occurred.²⁴ The fact these images can be manipulated by offenders allows them greater control over how the victim would perceive any sexual activity between them.²⁵ Offenders can still be committing an offence if they knowingly disseminate pornography to children that would otherwise be legal for adults to possess.

Offenders also use games where the rapes of child avatars desensitise children. This still breaches many different Federal laws, like use of a carriage service to menace or harass, especially when the material would be offensive to the ordinary person.²⁶ This habit could be child pornography with the anime depictions still being recognised as children. Policing these methods of one-on-one interactions between offender and victim may prevent the operation of any filtering software.²⁷ Online child rape games could be issued a take-down or cessation notice, or even be prosecuted, by the Australian Communication and Media Authority (ACMA) but this would require a party to complain about the content.²⁸ Blocking content would involve contacting filterers to have it blocked, and even then the offensive site must be hosted in Australia.²⁹ The use of mainstream Massively Multiplayer Online Role Playing Games (MMORPGs) to indulge in these fantasies may mean they lose their accounts.³⁰

For police, social networking websites are often an obstacle to retrieving information on interactions between offenders and victims.³¹ The difficulty to source offender-victim interactions for prosecutions when Facebook and MySpace have no contacts in Australia means police cooperation with the ACMA to access, remove or block offensive content.³² The presence of paedophiles on the internet led to Microsoft and Yahoo closing down its chat rooms but Facebook and MySpace have largely unenforced age restrictions.³³ Greater interaction between these social networking websites and law enforcement could mean banning registered sex offenders from using their services. This would require the mandatory provision of email addresses whenever they are registered as a sex offender, which has not occurred in Federal or State law yet.³⁴ To prevent online grooming, there would still need to be a conviction for a registrable offence. But banning sex offenders from using the internet would require complete co-operation with social network websites. Police would still have to conduct specialist online surveillance of offenders that may easily be evaded in the circumstances.

Conclusion

Police need the active involvement of parents, children and social networking websites to reduce online grooming as they cannot rely on agents posing as children to entrap offenders to prove their cases. The lack of research on the subject makes other preventative strategies difficult to formulate, assess or improve. There needs to be technology tailored to track keywords in online interactions and organise it effectively for police investigating suspicious activities as well as an ability for children to report grooming behaviour. This is needed to decrease the difficulties of police obtaining warrants to investigate online grooming on social networking websites.

¹ See *Criminal Code Act 1995* (Cth), ss 474.26-474.27; *Crimes Act 1900* (NSW), s 66EB; *Criminal Code Act 1899* (QLD), s 218A; *Criminal Law Consolidation Act 1935* (SA), s 63B; *Criminal Code Act 1924* (TAS), s 125D; *Criminal Code* (WA), s 204B; *Crimes Act 1900* (ACT), s 66; *Criminal Code Act* (NT), ss 131-132.

² See *Criminal Code Act 1995* (Cth), ss 474.26-474.27

³ See Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, March 9 2010, 2-3 (Dr Dan Jerker Borje Svantesson, Vice-Chair, Australian Privacy Foundation).

⁴ Ibid.

⁵ See Dr Julian Dooley, Professor Donna Cross, Dr Lydia Hearn, Robin Treyvaud, 'Review of existing Australian and international cyber-safety research' (2009), *Edith Cowan University*, http://www.dbcde.gov.au/data/assets/pdf_file/0004/119416/ECU_Review_of_existing_Australian_and_internat

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⁶ For example: See *R v Gedling* [2007] SADC 124 (Unreported, Millstead J, 21 November 2007); *R v Murray Colin Stubbs* [2009] ACTSC 63 (Unreported, Higgins CJ, 26 May 2009); *R v Holmes* [2006] NSWDC (Unreported, Williams DCJ, 19 May 2006); *R v Shephard* (2008) 189 A Crim R 165; For where a mother assumed her son's identity before police became involved: *Tector v R* [2008] NSWCCA (Unreported, Giles JA, Barr J, Hall J, 28 May 2008).

⁷ See Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, Canberra, March 9 2010, 13 (Commander Stephanie Taylor, Australian Federal Police).

⁸ See *R v Murray Colin Stubbs* [2009] ACTSC 63 (Unreported, Higgins CJ, 26 May 2009), [29], [38]-[39], [67]-[69].

⁹ *R v Gedling* [2007] SADC 124 (Unreported, Millstead J, 21 November 2007).

¹⁰ See Gabriel Wingate-Pearse, 'Jury told to acquit – Child Sex intent unproven', *Newcastle Herald* (Newcastle), 11 October 2006, 15.

¹¹ See Kim-Kwang Raymond Choo, 'Online Child Grooming: a literature review on the misuse of social networking sites for grooming children for sexual offences' (2009) 103 *Australian Institute of Criminology Research and Public Policy Series* 1, 31.

¹² *Ibid.*

¹³ See Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, March 9 2010, 4-5 (Dr Roger Clarke, Australian Privacy Foundation); Kim-Kwang Raymond Choo, 'Responding to Online Child Sexual Grooming: An Industry Perspective' (2009) 379 *Trends and Issues in Crime and Criminal Justice* 1, 5.

¹⁴ Kim-Kwang Raymond Choo, 'Online Child Grooming: a literature review on the misuse of social networking sites for grooming children for sexual offences' (2009) 103 *Australian Institute of Criminology Research and Public Policy Series* 1, 9-11.

¹⁵ *R v Gedling* [2007] SADC 124 (Unreported, Millstead J, 21 November 2007).

¹⁶ See Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, *Criminal Code Amendment (Misrepresentation of Age to Minor) Bill 2010* (2010) [2.11]-[2.15].

¹⁷ See Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, *Criminal Code Amendment (Misrepresentation of Age to Minor) Bill 2010* (2010).

¹⁸ *Ibid.*, [2.16]-[2.22].

¹⁹ See Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, *Criminal Code Amendment (Misrepresentation*

of Age to Minor) Bill 2010 (2010) [2.27]-[2.31]; *He Kaw Teh v R* (1984) 157 CLR 523, 568 (Brennan J); Andrew Ashworth, *Principles of Criminal Law* (6th ed, 2009), 38-39.

²⁰ See Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, *Criminal Code Amendment (Misrepresentation of Age to Minor) Bill 2010* (2010) [2.32].

²¹ See Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, Canberra, March 9 2010, 6 (Susan McLean, Cyber-Security Expert).

²² See Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, Canberra, March 9 2010, 8 (Susan McLean, Cyber-Security Expert); ABC News, 'AFP wants Facebook Cop' (2010), *ABC News*, <http://www.abc.net.au/news/stories/2010/05/26/2909452.htm> viewed 5th December 2010; News.com.au, 'Facebook Cop – coming to a computer screen near you' (2010), *News.com.au*, <http://www.news.com.au/technology/facebook-cop-coming-to-a-computer-screen-near-you-if-the-afp-has-its-way/story-e6frfo0-1225871440833> viewed 5th December 2010.

²³ See Patrick Forde and Andrew Patterson, 'Paedophile internet activity' (1998) 97 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1; Kim-Kwang Raymond Choo, 'Responding to Online Child Sexual Grooming: An Industry Perspective' (2009) 379 *Trends and Issues in Crime and Criminal Justice* 1, 5.

²⁴ See Kate Warner, 'Sentencing for child pornography' (2010) 84 *Australian Law Journal* 384, 387-388; *McEwen v Simmons* (2008) 73 NSWLR 10, 12-13 (Adams J); Gareth Griffith and Lenny Roth, 'Protecting Children from Online Sexual Predators' (2007) 10 *NSW Parliamentary Library Research Service Briefing Paper* 1, 34.

²⁵ See Kate Warner, 'Sentencing for child pornography' (2010) 84 *Australian Law Journal* 384, 388.

²⁶ See *Criminal Code Act 1995* (Cth), s 474.17.

²⁷ See Orren Prunckun, 'Particularly children: a qualitative evaluation of the effectiveness of Australia's internet censorship regulations' (2007) 14(1) *Murdoch University Electronic Journal of Law* 305, 309-310.

²⁸ See David Vaile and Renee Watt, 'Inspecting the Despicable, Assessing the Unacceptable: Prohibited Packets and the Great Firewall of Canberra' (2009) *University of New South Wales Legal Research Series* 35.

²⁹ See Kim-Kwang Raymond Choo, 'Online Child Grooming: a literature review on the misuse of social networking sites for grooming children for sexual offences' (2009) 103 *Australian Institute of Criminology Research and Public Policy Series* 1, 61.

³⁰ See Ian Warren and Darren Palmer, 'Crime risks of

three-dimensional virtual environments' (2010) 388 *Australian Institute of Criminology Trends in Issues in Criminal Justice* 1, 3-4.

³¹ See Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of the Commonwealth of Australia, Canberra, March 9 2010, 8 (Susan McLean, Cyber-Security Expert).

³² See Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of the

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³⁴ *Ibid.*

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