

Criminalising child grooming over the internet in South Africa – common law or legislation?

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Criminalising child grooming over the internet in South Africa – common law or legislation?

<u>Introduction</u>	3
<u>Media Reports</u>	3
<i>Katherine Tarbox</i>	3
<i>Justin Berry</i>	5
<u>Description of the Problem</u>	6
<i>What is grooming?</i>	6
<i>Who does this?</i>	7
<i>How does it happen? Typical scenarios</i>	7
<u>Websites</u>	7
<u>Chatting (IRC/MSN)</u>	9
<u>Email and Cellular Telephones</u>	10
<i>Cybersafety and the responsibility ISPs have</i>	10
<i>Effect on the child</i>	11
<u>Current Law – Common Law and/or Legislation</u>	12
<i>South Africa</i>	12
<i>United Kingdom</i>	15
<i>Canada</i>	15
<i>Australia</i>	16
<u>Instances of Online Grooming – Legal Cases</u>	17
<i>South Africa</i>	17
<i>United Kingdom</i>	18
<i>Canada</i>	22
<i>Australia</i>	24
<u>Legislation versus the common law</u>	25
<u>Conclusion</u>	27
<u>Bibliography</u>	28

Introduction

This paper discusses grooming of children using the internet and the criminalisation of such behaviour. The focus of this paper will be on whether the common law adequately deals with the crime of grooming or whether legislation needs to be developed in South Africa to deal with this issue, taking note of examples of legislation and case law from the United Kingdom, Canada and Australia. The responsibility of Internet Service Providers (ISPs) will be looked at briefly. The issue of child pornography will not be discussed as the problem of grooming is distinct and separate to the use or making of child pornography even though child pornography could be used in the grooming process or be a result of the process. This paper will show that grooming over the internet can be dealt with as *crimen iniuria* as the computer is a tool in the commission of the crime and not an object or victim of the crime, therefore there are no issues with having to attribute personality to the computer. It will be submitted that prosecuting under the common law crime of *crimen iniuria* is the appropriate way of dealing with grooming and that legislation need not be developed to criminalise grooming of children and ensure that electronic forms of grooming are covered.

Media Reports

Katherine Tarbox

Katie was 13 years old in 1995 when her family received a free CD-ROM from AOL and got connected to the internet.¹ Katie started using chat rooms to connect with other children her own age, or so she thought.²

‘Mark’ made contact with Katie in a teen chat room and told her he was 23.³ They started chatting regularly and she discovered that they had much in common.⁴ She thought that it was fate that they had met and that they had a rare connection.⁵ Katie says,

¹ House of Representatives Committee on Energy and Commerce *Chatting on-line: a dangerous proposition for children* (Serial No. 107–102) Hearing before the Subcommittee on Telecommunications and the Internet (2002) 4.

² House of Representatives Committee on Energy and Commerce (n 1) at 5.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

“He became my world; he became my best friend. He told me that I was beautiful, told me I was smart; he told me all the things that I thought I needed to hear at that age. And, yes, I did hear this from my parents, but my parents are not an older guy. And, a 13 year old girl, I think that anyone who has been in that position can understand what kind of value you would place on that type of attention.”⁶

Mark wanted to meet Katie. She agreed to meet him during a school swim team trip to Texas.⁷ One evening, Katie informed a friend that she was going to meet Mark in his hotel room.⁸ The friend tried to stop her, but Katie went anyway.⁹ After some time of talking, Katie tried to leave, but she was forcefully stopped and molested by Mark.¹⁰ Katie’s mother, who was a chaperon on the trip, arrived too late with the hotel police to stop Mark after being told by Katie’s friend what was happening.¹¹

The police questioned Katie and Mark, who turned out to be a 41 year old named Frank.¹² Katie lost her good reputation at school after the incident and had to go to boarding school.¹³

Katie’s case was probably one of the first cases of this nature, if not the first. Frank was tried under the 1996 Communications Decency Act and eventually sentenced to 18 months imprisonment.¹⁴ During the trial, Katie was diagnosed with clinical depression, but started her process of recovery through the writing of her book.¹⁵ Katie tells her story as she feels that people need to know about these issues.¹⁶ She says that she was 13, vulnerable and preyed upon by a paedophile using the internet who knew this.¹⁷

⁶ House of Representatives Committee on Energy and Commerce (n 1) at 6.

⁷ Ibid.

⁸ Ibid.

⁹ House of Representatives Committee on Energy and Commerce (n 1) at 6-7.

¹⁰ House of Representatives Committee on Energy and Commerce (n 1) at 7.

¹¹ House of Representatives Committee on Energy and Commerce (n 1) at 8.

¹² Ibid.

¹³ Ibid.

¹⁴ House of Representatives Committee on Energy and Commerce (n 1) at 9.

¹⁵ Ibid.

¹⁶ House of Representatives Committee on Energy and Commerce (n 1) at 4.

¹⁷ House of Representatives Committee on Energy and Commerce (n 1) at 9.

Justin Berry

Eleven years later, Oprah Winfrey hosted a show in which teenager Justin Berry told his story of being groomed online and abused countless number of times.¹⁸ At the age of 13, Justin was an honour roll student and running his own web design business.¹⁹ Justin discovered web cameras and procured one for his own personal use with the thought in mind that he would be able to meet girls on the internet.²⁰

Justin registered his webcam and details on a website which allowed people to connect with each other.²¹ Justin started chatting with many different people, including older men.²² The men started offering Justin gifts to appear on his webcam and slowly started convincing him to remove his clothing and perform sexual acts for payment.²³ In short, a networked group of paedophiles convinced Justin to start his own pornography site and supported him in the starting up of a very lucrative business.²⁴ Justin met up with many of these men and was abused countless number of times.²⁵

Unfortunately for Justin, a fellow pupil discovered his website and distributed several of Justin's videos at school.²⁶ At this stage, Justin's mother was not aware of what had been happening to her son.²⁷ She thought he was merely going through a troublesome adolescence.²⁸ Justin, then 16 years old and fearing the shame, ran away to his father in Mexico thinking he was getting away from his horror.²⁹ When his father found out the reason for his visit, he offered to help Justin expand his business.³⁰

¹⁸ The Oprah Winfrey Show *Exclusive: the young boy lured into pornography online* (15 Feb 2006).

¹⁹ The Oprah Winfrey Show (n 18) at 3-4.

²⁰ The Oprah Winfrey Show (n 18) at 4.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ The Oprah Winfrey Show (n 18) at 9.

²⁵ The Oprah Winfrey Show (n 18) at 9 and 12.

²⁶ The Oprah Winfrey Show (n 18) at 9.

²⁷ The Oprah Winfrey Show (n 18) at 7.

²⁸ *Ibid.*

²⁹ The Oprah Winfrey Show (n 18) at 9.

³⁰ The Oprah Winfrey Show (n 18) at 9-10.

Justin's website was discovered by a New York Times journalist, Kurt Eichenwald who was doing research on fraud.³¹ Mr Eichenwald met up with Justin and managed to place him into secure custody away from his father and former clients.³² Mr Eichenwald did a sample study on 300 of Justin's 1500 clients and found these men to be paediatricians, counsellors, teachers and children's lawyers.³³

Justin is now in protective custody after receiving death threats for going public with his story.³⁴ Justin has lost his childhood and innocence through this experience. How many more children need to go through these horrors without recourse?

Description of the Problem

What is grooming?

Grooming is the process that paedophiles use to gain the trust and lower the inhibitions of vulnerable children to ultimately ensure that the children are prepared to perform or be a part of sexual acts.³⁵ Grooming may be sexual or non-sexual in content.³⁶ Non-sexual grooming would include gaining the child's trust by inquiring into his or her personal life or sympathising with any emotional problems the child might be experiencing.³⁷ Paedophiles may also threaten children during the grooming process in order to ensure co-operation.³⁸ Paedophiles who groom online tend to misrepresent their age as close to the age of the child to make the child more comfortable talking to them.³⁹

³¹ The Oprah Winfrey Show (n 18) at 13.

³² Ibid.

³³ The Oprah Winfrey Show (n 18) at 16.

³⁴ The Oprah Winfrey Show (n 18) at 17.

³⁵ 'Child grooming' available at http://en.wikipedia.org/wiki/Child_grooming (accessed 22 June 2006); Nicolee Dixon 'Catching "cyber predators": the Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld)' Research Brief No 2002/35 at 1-2; Rachel O'Connell 'Be somebody else but be yourself at all times: degrees of identity deception in chatrooms' unpublished paper at 3; Ilene R. Berson and Michael J. Berson 'Evolving a community initiative to protect children in cyberspace final report' (2002) 37; Dr Julia Davidson and Elena Martellozzo 'Policing the internet and protecting children from sex offenders online: when strangers become "virtual friends"' Cybersafety Conference at the University of Oxford (2005) at 4-5.

³⁶ Larry Magid 'How to get rid of spyware' available at <http://www.safekids.com/chatdanger.htm> (accessed 01 July 2006); Dixon (n 35) at 2; O'Connell (n 35) at 3.

³⁷ Magid (n 36); Dixon (n 35) at 2; Berson and Berson (n 35) at 37; Davidson and Martellozzo (n 35) at 4-5.

³⁸ Dixon (n 35) at 4.

³⁹ Magid (n 36); Dixon (n 35) at 2; O'Connell (n 35) at 2; Berson and Berson (n 35) at 38.

Grooming occurs online (the focus of this paper) and offline in the real world.⁴⁰ The grooming process will entail several stages of communication.⁴¹ These have been identified by researchers as the friendship forming stage (getting to know each other), the relationship forming stage (enquiries into personal life), the risk assessment stage (the paedophile assessing the risk to himself or herself), the exclusivity stage (making the child feel that only the paedophile is there for them to talk to about problems) and the sexual stage.⁴² It has been said that grooming online does not introduce anything new to the process, but it does usually speed it up.⁴³

Who does this?

Paedophiles the world over have found the internet to be somewhat of a haven and a bit of heaven. They can remain anonymous until ready to pounce on their victim and they can network with other paedophiles to share victim information, pornography, methodology and predilections.⁴⁴ One such group has written their own manifesto called “The BoyLove Manifesto” which advocates love between men and boys.⁴⁵ These groups of people work together in frightening numbers, as was seen above in Justin Berry’s story.⁴⁶ No vulnerable child is a match for the numbers united in this cause against children.⁴⁷

How does it happen? Typical scenarios

Websites

There are various websites on the internet that have been created in order to allow people to easily connect with others. Most of these sites are adult dating sites. Some of these sites such as the datingbuzz service have measures in place to ensure

⁴⁰ Berson and Berson (n 35) at 37-8.

⁴¹ Ibid; Rachel O’Connell ‘A typology of cyberexploitation and on-line grooming practices’ 6-7.

⁴² O’Connell (n 41) at 6-7.

⁴³ Alisdair A. Gillespie ‘Tackling grooming’ (2004) 77 *Police Journal* 239 at 240.

⁴⁴ O’Connell (n 41) at 5; Debbie Mahoney and Dr Nancy Faulkner ‘Pedophiles on the Web- SOCUM: HealthyPlace.com Abuse Issues Community-Sexual Abuse, Physical Abuse, Emotional Abuse’ available at <http://www.healthyplace.com/Communities/Abuse/socum/articles/pedophiles.htm> (accessed 01 July 2006); Dixon (n 35) at 1; Marni Feather ‘Internet and child victimisation’ presented at the Children and Crime: Victims and Offenders Conference Australian Institute of Criminology Brisbane (1999) 6.

⁴⁵ Mahoney and Faulkner (n 44); ‘The Boylove Manifesto, Pedophiles on the Internet- SOCUM: HealthyPlace.com Abuse Issues Community-Sexual Abuse, Physical Abuse, Emotional Abuse’ available at http://www.healthyplace.com/Communities/Abuse/socum/articles/pedophiles_2.htm (accessed 01 July 2006).

⁴⁶ The Oprah Winfrey Show (n 18) at 9.

⁴⁷ Ibid.

people using the service are adults.⁴⁸ These measures include individual approval of every photograph submitted to the site, no publication of personal details and payment using credit cards.⁴⁹ Users are not allowed to contact each other unless payments for the service have been made.⁵⁰ There are other sites, however, that do not apply security measures. The adultfriendfinder website allows registration and posting of photographs without any age verification.⁵¹ Users can post personal information and the site allows live chat.⁵² There are currently approximately 83 000 registered South African users on the adultfriendfinder website.⁵³ There is an attempt to create awareness for the safety of children on the website using a text link called 'Protect Kids' at the bottom of the website pages, but is this enough of a security measure?⁵⁴

Webcam portal sites exist in abundance. A quick search using Google will bear testament to this. Users will post a link to the site which hosts their webcam and usually archived pictures.⁵⁵ Many of these sites will also contain a wish list of items which can be bought online if a viewer enjoys the show and sent to the webcam owner.⁵⁶ Site users would be able to post comments on the website and make contact with the owner via email.⁵⁷

Microsoft offers a service called MSN Spaces which is linked to their instant messaging service.⁵⁸ The sign up process for one of these accounts literally takes five minutes. This service allows users to create sites easily which will display their chat profile and any other information they wish to reveal.⁵⁹ Users can choose to allow

⁴⁸ 'DatingBuzz – Company Information' available at <http://www.datingbuzz.com/s/info/company.php> (accessed 08 September 2006).

⁴⁹ 'DatingBuzz SA – Terms of Use' available at <http://www.datingbuzz.co.za/s/help/terms.php> (accessed 08 September 2006).

⁵⁰ Ibid.

⁵¹ 'Adult FriendFinder – The World's Largest Sex Personals Site' available at <http://adultfriendfinder.com/> (accessed 08 September 2006).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Brittany Berin 'saturnine' available at <http://www.mesmerized.org/subhuman/> (accessed 01 July 2006); Katharine Mieszkowski 'Salon.com Technology | Candy from strangers' available at http://archive.salon.com/tech/feature/2001/08/13/cam_girls/index.html (accessed 01 July 2006).

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ 'Windows Live Spaces' available at <http://spaces.msn.com/> (accessed 08 September 2006).

⁵⁹ Ibid.

public access to their profiles which would make it easier for youngsters to be targeted by paedophiles.⁶⁰

Chatting (IRC/MSN)

Paedophiles often will meet children online in chat rooms.⁶¹ Chat rooms may be part of an IRC (Internet Relay Chat) server where instant messages can be sent via a public room or private message or may be hosted on web sites.⁶² Adults using a false age may directly seek conversation in a chat room and post messages or they may lurk and wait for a child to make conversation which they will then comment on in private message.⁶³ During initial communication, details such as age, sex and location are usually exchanged and sometimes adults will be honest about their age, but usually they pretend to be close to the age of the child.⁶⁴ In these settings, paedophiles are more likely to target children who seem troubled than those who do not.⁶⁵

A similar chat service used by paedophiles is MSN Messenger, which is an instant messaging service whereby people can make contact either using a known email address or by a search through public profiles.⁶⁶ Messages are sent 'real time' which means they appear as they are typed.⁶⁷ These messages are sent directly from person to person.⁶⁸ The MSN client allows voice conversations as well as webcam feeds directly into the window where the instant messaging conversation is occurring.⁶⁹ Other large internet corporations such as Yahoo and Skype provide similar instant messaging services.⁷⁰

⁶⁰ Ibid; O'Connell (n 41) at 5.

⁶¹ Dixon (n 35) at 2-3; O'Connell (n 35) at 2.

⁶² Dixon (n 35) at 3-4; Feather (n 44) at 3.

⁶³ O'Connell (n 41) at 4-5.

⁶⁴ O'Connell (n 41) at 5; Magid (n 36); Dixon (n 35) at 2; O'Connell (n 35) at 2.

⁶⁵ Dixon (n 35) at 3.

⁶⁶ 'Windows Live Messenger' available at <http://get.live.com/messenger/overview> (accessed 10 July 2006); O'Connell (n 41) at 5-6.

⁶⁷ 'Windows Live Messenger' (n 66).

⁶⁸ Ibid.

⁶⁹ 'Windows Live Messenger' available at <http://get.live.com/messenger/features> (accessed 10 July 2006).

⁷⁰ 'Yahoo! Messenger with Voice – Chat, Call, Share Photos, and More' available at <http://messenger.yahoo.com/> (accessed 10 July 2006); 'Skype – The whole world can talk for free' available at <http://www.skype.com/helloagain.html> (accessed 10 July 2006).

Microsoft has closed down many of their chat rooms which were hosted on their servers due to this problem, and the ones that are still open are strictly monitored.⁷¹ There is some belief that the complete closure of chat rooms by Microsoft in Australia will help to eliminate the problem of grooming.⁷²

Email and Cellular Telephones

Email and cellular telephones are logically the next step toward private communication after chatting online. It is not easy to find out an email address or a telephone number unless a person has made it publicly available. Therefore an email address or telephone number is usually revealed by a child, unless it has been posted on a website. Cellular telephones more than email provide the perfect tool to further the grooming process and to arrange secret meetings.⁷³

Cellular phones pose an even greater danger than email as those which are internet enabled provide access to dating sites, chat lines, pictures and email.⁷⁴ Services such as MXit which allow full connectivity to instant messaging services using a cellular telephone are becoming increasingly popular with adults and children alike in South Africa.⁷⁵

Cybersafety and the responsibility ISPs have – Can they be held responsible?

There is no law governing the responsibility of Internet Service Providers to prevent or monitor grooming.⁷⁶ If an ISP subscribes to the good conduct principles of the industry, that ISP will most likely be protected against civil and criminal lawsuits

⁷¹ 'CNN.com – MSN to close chat rooms – Sep. 24, 2003' available at <http://edition.cnn.com/2003/TECH/internet/09/24/microsoft.chat/> (accessed 01 July 2006).

⁷² Rowena Johns 'Child sexual offences: an update on initiatives in the criminal justice system— briefing paper 20/2003' (21 November 2003) available at <http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/9A466D78D50EC630CA256ECF0009F0C5> (accessed 25 June 2006) at [81]; 'Microsoft closes chatrooms over pedophile fears – theage.com.au' available at <http://www.theage.com.au/articles/2003/09/24/1064083027707.html?from=storyrhs> (accessed 01 July 2006).

⁷³ Carien du Plessis and Wendy Knowler 'Smut in small hands' *Fair Lady* May 2006 at 83; Rachel O'Connell 'Fixed to mobile internet industry: the morphing of criminal activity on-line' 11.

⁷⁴ Larry Magid 'Talk to Your Kids about Cell Pho' available at <http://www.safekids.com/cellphone.htm> (accessed 01 July 2006); du Plessis and Knowler (n 73) at 83-4; O'Connell (n 73) at 11.

⁷⁵ 'MXit' available at <http://www.mxit.co.za> (accessed 08 September 2006).

⁷⁶ Dominic Cull *ISPs in the middle - an investigation of the role of Internet Service Providers in the regulation of the internet and the law of specific application to Internet Service Providers in South Africa* (LLM Dissertation, University of Cape Town, 2004) 27.

if grooming online does occur through the use of that ISP's network.⁷⁷ Most ISPs do provide reporting procedures for inappropriate behaviour and will most probably work together with law enforcement agencies to eradicate this problem, as they are doing with child pornography.⁷⁸

Individual privacy is a concern when dealing with the grooming problem. Should the details of any party involved be revealed by an intermediate service provider? The Electronic Communications and Transactions Act provides protection for personal information that the ISP has collected but the principles in the ECT Act are not compulsory and only binding if the ISP has agreed to be bound by them.⁷⁹ The result of this is that an ISP who has agreed to be bound by the principles, who reveals information to the state, could be considered to be breaching the client's right to privacy.⁸⁰ It is necessary to raise this concern but not to solve the problem as it is outside the scope of the discussion in this paper.

Effect on the child

It is trite that grooming is an assault upon the dignity of the child and therefore a violation of the right to dignity as embodied in s 10 of the Constitution.⁸¹ When examining the effect on the dignity of the child it is important to note specifically that grooming affects the process of individuation that every child will go through.⁸² The effect of the grooming is that a child will never have the opportunity to fully develop their personality in a way they could have if that deviant power had not been exerted over them. Professor Cornell submits that there are three necessary conditions 'that insure a minimum degree of individuation' which allow us to transform 'into individuated beings who can participate in public and political life as equal citizens.'⁸³ These three conditions are bodily integrity, 'access to symbolic forms sufficient to

⁷⁷ Cull (n 76) at 18.

⁷⁸ Cull (n 76) at 52; Bianca Wright 'Fighting child porn' *SA Computer Magazine* April 2004 at 50-1.

⁷⁹ Reinhardt Buys (ed) *Cyberlaw@SA The law of the internet in South Africa* (2004) 173.

⁸⁰ Cull (n 76) at 53.

⁸¹ Constitution of South Africa, 1996 s 10.

⁸² "Individuation comprises the processes whereby the undifferentiated becomes or develops individual characteristics, or the opposite process by which components of an individual are integrated into a more indivisible whole." 'Individuation – Wikipedia, the free encyclopedia' available at <http://en.wikipedia.org/wiki/Individuation> (accessed 08 September 2006).

⁸³ Drucilla Cornell *The imaginary domain* (New York: Routledge, 1995) 4.

achieve linguistic skills permitting the differentiation of oneself from others’ and ‘the protection of the imaginary domain’.⁸⁴

The third of these conditions, the imaginary domain, is of particular importance to the issues at hand. What is the imaginary domain?

The notion of the imaginary domain recognizes that literal space cannot be conflated with psychic space and reveals that our sense of freedom is intimately tied to the renewal of the imagination as we come to terms with who we are and who we wish to be as sexuate beings.⁸⁵

This view holds that our psychic space (our imagination) can never be melded with our literal space. Therefore, if our imagination is affected in some way, there is no way that reality will take precedence over the imagination. That damage to the imagination is there forever. Cornell states that because the imaginary cannot be separated from ‘one’s sexual imago’ nobody else’s imaginary should be imposed onto any other person ‘in such a way as to rob him or her of respect for his or her sexuate being.’⁸⁶ If this is done and self-respect is lost, ‘crippling shame’ can be experienced.⁸⁷

According to Rawls, self-respect is a primary good and without self-respect ‘nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them.’⁸⁸ Grooming fundamentally affects a child’s imaginary domain thereby ultimately affecting their self-respect. The child will be damaged in a way that recovery from the experience might be impossible. No child should be subjected to this and if they are there is a duty upon the state to ensure that the child has an adequate remedy. We should never forget that the interests of the child are of paramount importance.⁸⁹

Current Law – Common Law and/or Legislation

South Africa

⁸⁴ Cornell (n 83) at 4.

⁸⁵ Cornell (n 83) at 8.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Cornell (n 83) at 9.

⁸⁹ Constitution of South Africa, 1996 s 28(2).

Grooming can be prosecuted under the common law crimes of *crimen iniuria* or indecent assault.⁹⁰ Indecent assault invariably is *crimen iniuria* and it is up to the prosecutor to decide which the crime will be tried under, but in a case of grooming *crimen iniuria* would be more appropriate as the assault upon the child's dignity should be emphasised.⁹¹ Professor Burchell submits with regards to grooming 'that the supple common-law definitions of indecent assault and *crimen iniuria*...provide a more effective means of proscription than the limiting terms of a statute.'⁹² Burchell believes that the "grooming" of a child via the internet as a preliminary step towards engaging in sexual conduct with the child would constitute an impairment of the dignity of the child' and therefore be *crimen iniuria*.⁹³ The elements of *crimen iniuria* are unlawful and intentional impairment of the dignity or privacy of another person.⁹⁴ The test for determining whether dignity has been impaired is if the sensibility of a reasonable person is or would be offended by the conduct.⁹⁵ The victim does not have to be aware that their dignity is being impaired at the time of the conduct but can become aware of the impairment of their dignity after the conduct has been committed.⁹⁶ There are exceptional cases where the victim does not have to be aware of the impairment of their dignity.⁹⁷ With regards to intention, Burchell submits that a standard of negligence might suffice and freedom of expression curtailed if an impairment of dignity is involved.⁹⁸ The common law approach will be discussed below and compared to a statutory approach and the efficacy of both considered.

At present there is no legislation dealing with the issue of grooming online in South Africa. The South African Law Commission in Project 107, the sexual offences discussion paper, did not deal with the issue of grooming online specifically.⁹⁹ The report did suggest that an offence be included in the above Bill which would criminalise the promotion of a sexual offence with a child.¹⁰⁰ The Criminal Law (Sexual Offences) Amendment Bill that was tabled in Parliament in

⁹⁰ Jonathan Burchell *Principles of Criminal Law* 3ed (Cape Town: Juta, 2005) 740.

⁹¹ Burchell (n 90) at 750-51.

⁹² Burchell (n 90) at 740.

⁹³ Burchell (n 90) at 750.

⁹⁴ Burchell (n 90) at 746.

⁹⁵ Burchell (n 90) at 749.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ South African Law Commission *Sexual Offences* (Project 107) Discussion Paper 102 (2002) at 299.

¹⁰⁰ *Ibid.*

2003 created an offence which might be used to cover grooming in clause 10. The clause states the following:

Promotion of sexual offence with child

10. A person who—

(a) manufactures or distributes an article that promotes or is intended to promote a sexual offence with a child; or

(b) who supplies or displays to a child an article which is intended to be used in the performance of a sexual act with the intention to encourage or enable that child to perform such sexual act,

is guilty of the offence of promoting a sexual offence with a child and is liable upon conviction to a fine or imprisonment for a period not exceeding six years or to both a fine and such imprisonment.

The memorandum on the objects of the Criminal Law (Sexual Offences) Amendment Bill made comment in point 2.11 to the effect that grooming does occur and ‘includes the provision or display of articles used to perform sexual acts to or with children.’¹⁰¹

The memorandum also states that ‘[c]hildren deserve legislative protection in this regard and clause 10 therefore deals with the promotion of sexual offences with children.’¹⁰² The memorandum did not discuss grooming over the internet or by using electronic means.¹⁰³ The current version (working document) of the Criminal Law (Sexual Offences) Amendment Bill specifically deals with the issue of grooming in clause 17.¹⁰⁴ This clause states the following:

Sexual grooming of child

17. A person (“A”) who, for purposes of the sexual grooming of a child complainant (“B”)—

(a) manufactures, distributes or facilitates the manufacture or distribution of an article that promotes or is intended to be used in the commission of a sexual act with or by B;

(b) supplies or displays to B an article which is intended to be used in the performance of a sexual act with the intention to encourage or enable B to perform such sexual act;

(c) having met or communicated with B by any means from, to or in any part of the world, on at least two earlier occasions, intentionally travels to meet or meets B with the intention of committing a sexual act, during or

¹⁰¹ Criminal Law (Sexual Offences) Amendment Bill [B20-2003] Memorandum on the objects of the Criminal Law (Sexual Offences) Amendment Bill, 2003 clause 2.11 at 28.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Burchell (n 90) at 739; Updated version (working document) of the Criminal Law (Sexual Offences) Amendment Bill [B20-2003] available at <http://www.pmg.org.za/bills/060619b50-03.htm> (accessed 08 September 2006).

after the meeting; or

(d) arranges or facilitates the meeting or communication with B by any means from, to or in any part of the world, with the intention that A or a third person (“C”) will commit a sexual act with B, during or after such meeting;

is guilty of the offence of sexual grooming of a child.

This clause will be discussed in detail below.

United Kingdom

The United Kingdom offence contained in s 15 of the Sexual Offences Act 2003 is called ‘Meeting a child following sexual grooming etc.’¹⁰⁵ It is an offence if a person aged 18 or over intentionally meets or travels with the intention to meet in any part of the world another person under the age of 16 after having met or communicated with that other person on at least two occasions beforehand with the intention to do anything to or in respect of the other person which will result in an offence.¹⁰⁶ For the offence to be complete, the offender must meet the child or travel to meet the child with the intent to commit an offence.¹⁰⁷ How does one determine the intention to commit an offence? If the offender is in possession of sexual objects such as condoms or lubricants, intention can be inferred.¹⁰⁸ The grooming process (conversations or meetings) need not have a sexual content.¹⁰⁹ If the offender reasonably believes that the victim is 16 or over, this could be a defence.¹¹⁰ This offence results in a maximum sentence of ten years imprisonment.¹¹¹

Canada

Section 172.1 of the Canadian Criminal Code contains the offence of luring a child using a computer system.¹¹² This offence carries a maximum penalty of five years imprisonment.¹¹³

¹⁰⁵ Sexual Offences Act s 15.

¹⁰⁶ Ibid.

¹⁰⁷ Sexual Offences Act Explanatory Notes s 15 para 28 available at <http://www.opsi.gov.uk/ACTS/en2003/2003en42.htm> accessed (08 September 2006).

¹⁰⁸ Sexual Offences Act Explanatory Notes (n 107) at para 29.

¹⁰⁹ Sexual Offences Act Explanatory Notes (n 107) at para 27.

¹¹⁰ Sexual Offences Act s 15.

¹¹¹ Sexual Offences Act s 15(4).

¹¹² Criminal Code, RSC 1985, c C-46 s172.1.

¹¹³ Ibid.

Australia

Australian Federal Legislation deals with grooming in s 474.27 of the Criminal Code 1995.¹¹⁴ This section contains the offence which is committed with a person uses a carriage service (the internet, cellular telephone, etc) to groom a person under the age of 16 years.¹¹⁵ A maximum penalty of 15 years imprisonment is the penalty for this offence.¹¹⁶

Some Australian territories have legislation dealing with grooming. In the New South Wales jurisdiction of Australia the issue of grooming is being addressed legally.¹¹⁷ The offence to be developed will focus on the usage of electronic communication devices to ‘entice a child into illegal sexual activity.’¹¹⁸

In the Queensland jurisdiction, the Sexual Offences (Protection of Children) Amendment Bill proposed that section 218A be inserted into the Criminal Code.¹¹⁹ This section creates an offence when ‘a person [uses] electronic means with the intent to procure a child under 16 to commit a sexual act’.¹²⁰ The offence will result in a maximum sentence of five years imprisonment or ten years if the child is under the age of 12.¹²¹ This Bill has been passed and the offence is part of the Criminal Code.¹²²

The Australian Capital Territory has legislative provision in the Crimes Act 1900 that deals with ‘activities of paedophiles who use electronic means to suggest to a young person that the young person commit or take part in, or watch someone else committing or taking part in, an act of a sexual nature.’¹²³ A first offence attracts a maximum sentence of 5 years imprisonment and a second or other offence 10 years imprisonment.¹²⁴

¹¹⁴ Criminal Code 1995 s 474.27.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Johns (n 72) at [81].

¹¹⁸ Ibid.

¹¹⁹ Dixon (n 35) at 1.

¹²⁰ Ibid.

¹²¹ Dixon (n 35) at 11.

¹²² *R v Hays* [2006] QCA 20.

¹²³ Dixon (n 35) at 13.

¹²⁴ Ibid.

Instances of Online Grooming – Legal Cases

A selection of relevant cases will be examined below. The examination of each individual case will focus on the online grooming aspect of the case and not the counts of abuse or assault.

South Africa

There are currently no reported legal cases involving a child being groomed online in South Africa. There are, however, magazine accounts of grooming and related issues. The SA Computer Magazine, in an article on child pornography, raised concerns about the luring of children over the internet.¹²⁵ The Fair Lady May 2006 edition ran a special report which discussed the issue of access to pornography using cellular telephones.¹²⁶

Fair Lady included in this special report a column titled 'A Paedophile Speaks'.¹²⁷ This column was written by a 31 year old sales rep self-proclaimed paedophile who states that '[a]lmost all cellphones come with built-in cameras these days...which is fantastic for paedophiles.'¹²⁸ The ability to take these pornographic images of children combined with the ability to send these as picture messages to children is the perfect tool for grooming.¹²⁹

The magazine also investigated a website called MXit.co.za (referred to above) which is essentially a dating service website that allows users to message one another using cellular telephones instead of regular email on a computer.¹³⁰ There was a report of a Durban mother whose 13 year old daughter received a telephone call from a man the girl thought was a 14 year old whom she had 'met' through the services of the website.¹³¹ The mother took the cellular telephone away from her daughter and started speaking to the 'teenager' who turned out to be a middle-aged man.¹³² Childline national coordinator Joan van Niekerk is reported as saying that

¹²⁵ Wright (n 78) at 50.

¹²⁶ Du Plessis and Knowler (n 73) at 83.

¹²⁷ Du Plessis and Knowler (n 73) at 86.

¹²⁸ Ibid.

¹²⁹ Du Plessis and Knowler (n 73) at 83-4.

¹³⁰ Du Plessis and Knowler (n 73) at 83.

¹³¹ Du Plessis and Knowler (n 73) at 84.

¹³² Ibid.

‘she has recently received a spate of complaints’ about cellular phone related ‘cases of sexual violations against children’.¹³³

United Kingdom

The United Kingdom has several legal cases involving the grooming of children online as well as several newspaper reports which will not be discussed here but will be listed in the bibliography of this paper.¹³⁴

In the case of *A v The Queen*, a 15 year old boy (A) met an 11 year old girl (G) via an internet chat room.¹³⁵ A told G that he was 15 years old and she told him that she was 13 years old.¹³⁶ Her mother described her as ‘a little shy and over-eager to please’.¹³⁷ A suggested that they meet.¹³⁸ G then told her mother that he was a 13 year old friend from school ‘who was moving away’ and asked if he could stay and visit with her.¹³⁹ Through some deception, the mother was convinced that this was true, and A went to stay with G.¹⁴⁰ When the mother met A, she realised that he was older than 13 and a friend of hers took the opportunity to inform him that G was only 11 years old.¹⁴¹ The two children then went out together to the ‘cinema where sexual intercourse took place with G sitting on [A’s] lap.’¹⁴² There were several other successful and unsuccessful attempts at sexual intercourse between the two children.¹⁴³ A was asked to leave the house and once he had left, G told her mother what had happened.¹⁴⁴ In the trial court, counsel tried to put forward that A had not groomed G, but this was not accepted.¹⁴⁵ A was convicted, was liable to notification requirements, was not allowed to work with children for ten years, was not allowed to use the internet for ten years, and was sentenced to a 3 ½ year sentence.¹⁴⁶

¹³³ Ibid.

¹³⁴ ‘BBC NEWS | England | Manchester | Girl raped by chatroom “friend”’ available at <http://news.bbc.co.uk/1/hi/england/manchester/3078210.stm> (accessed 01 July 2006).

¹³⁵ *A v The Queen* [2005] EWCA Crim 3104 at [2]

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ *A v The Queen* (n 135) at [3].

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ *A v The Queen* (n 135) at [4].

¹⁴² *A v The Queen* (n 135) at [5].

¹⁴³ *A v The Queen* (n 135) at [5]-[6].

¹⁴⁴ *A v The Queen* (n 135) at [7].

¹⁴⁵ *A v The Queen* (n 135) at [8].

¹⁴⁶ *A v The Queen* (n 135) at [20]-[25].

In the case of *Michael Anthony Wheeler*, a 34/35 year old man committed sexual offences against two 13 year old girls.¹⁴⁷ W made contact with one of the girls via an internet chat room.¹⁴⁸ In the words of the court:

With complete justification such conduct causes particular concern to the public at large because of the difficulty for parents which it makes in maintaining a proper control over such access to their children. The fact that that access usually takes place in their home makes it the more serious because parents are entitled to feel that their child is safe when they are within the home.¹⁴⁹

The girl, who was then 11, claimed to be 16 and W, who was then 31/32, claimed to be 19.¹⁵⁰ They chatted to each other for 18 months before agreeing to meet up.¹⁵¹ When they did meet up, they realised the significant difference in age, but continued to keep in contact.¹⁵² Meetings occurred and gifts were exchanged over this period.¹⁵³ Sexual intercourse followed soon after this.¹⁵⁴ After several months, the girl's father became suspicious, the police were notified and W was arrested and charged.¹⁵⁵ The court went on to say that they needed 'to deliver a clear message of disapproval' about the 'use by older men of Internet chat rooms used by young girls'.¹⁵⁶ The court felt that this behaviour warranted sentences at 'the top end of the range'.¹⁵⁷ W was sentenced to an overall extended sentence 'of seven years of which the custodial part [was] four and a half years' imprisonment.¹⁵⁸

In the case of *Gary Michael Britton*, Adam, a 15 year old boy, contacted B through a message board in a teen chat room.¹⁵⁹ A believed B to be 19 years of age.¹⁶⁰ A telephoned B to converse and told B that he was 15.¹⁶¹ Several telephone

¹⁴⁷ *Attorney General's Reference No. 39 of 2003 (Michael Anthony Wheeler)* [2003] EWCA Crim 3068 at [2]-[3].

¹⁴⁸ *Attorney General's Reference No. 39 of 2003 (Michael Anthony Wheeler)* (n 147) at [5].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Attorney General's Reference No. 39 of 2003 (Michael Anthony Wheeler)* (n 147) at [6].

¹⁵¹ *Ibid.*

¹⁵² *Attorney General's Reference No. 39 of 2003 (Michael Anthony Wheeler)* (n 147) at [7].

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Attorney General's Reference No. 39 of 2003 (Michael Anthony Wheeler)* (n 147) at [8]-[10].

¹⁵⁶ *Attorney General's Reference No. 39 of 2003 (Michael Anthony Wheeler)* (n 147) at [49].

¹⁵⁷ *Ibid.*

¹⁵⁸ *Attorney General's Reference No. 39 of 2003 (Michael Anthony Wheeler)* (n 147) at [56].

¹⁵⁹ *Attorney General's Reference No. 54 of 2003 (Gary Michael Britton)* [2003] EWCA Crim 3948 at [4].

¹⁶⁰ *Ibid.*

¹⁶¹ *Attorney General's Reference No. 54 of 2003 (Gary Michael Britton)* (n 159) at [5].

calls, text messages and gifts followed from this.¹⁶² B then asked A to be his boyfriend, and after some persuasion A agreed.¹⁶³ More gifts followed.¹⁶⁴ After B put down a deposit for a scooter for A, he sent A sexually explicit letters.¹⁶⁵ Several meetings occurred after this in which Polaroid pictures of A naked were taken and several sexual acts were performed involving A, B and two other teenagers.¹⁶⁶ The scooter was then fully paid for sent to A.¹⁶⁷ Sexual intercourse between A and B happened after the scooter was delivered.¹⁶⁸ A's mother discovered what had been happening and informed the police who then arrested B.¹⁶⁹ A then threatened to commit suicide because of the shame he would experience.¹⁷⁰ The court then discussed 'the use of the internet chatroom and the period of grooming' as an aggravating feature and confirmed the statement made in the *Wheeler* case that this behaviour should be dealt with severely.¹⁷¹ The sentence imposed was not an extended as it was recognised that A was 16 when sexual intercourse took place between A and B and that it was A who had initiated contact over the internet and pursued the relationship in this manner.¹⁷² B was sentenced to an overall period of five and a half years and was not allowed to work with children.¹⁷³

In the case of *David Michael Briggs*, B, who was 30 at the time, passed himself off as a 17 year old male to a 13 year old girl who had had contacted him using the internet.¹⁷⁴ Their communication moved from the internet to telephone conversations and text messages and they eventually arranged to meet (the girl was 14 by this time).¹⁷⁵ B indecently assaulted the girl during their first meeting and they had sexual intercourse during subsequent meetings on several occasions.¹⁷⁶ The girl's mother discovered a suspicious note and notified the police who then arranged for the

¹⁶² *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [5]-[6].

¹⁶³ *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [8].

¹⁶⁴ *Ibid.*

¹⁶⁵ *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [9].

¹⁶⁶ *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [10]-[11].

¹⁶⁷ *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [11]-[12].

¹⁶⁸ *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [12].

¹⁶⁹ *Ibid.*

¹⁷⁰ *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [13].

¹⁷¹ *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [16].

¹⁷² *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [21]-[23].

¹⁷³ *Attorney General's Reference No.54 of 2003 (Gary Michael Britton)* (n 159) at [27].

¹⁷⁴ *Attorney General's Reference No. 127 of 2004 (David Michael Briggs)* [2005] EWCA Crim 257 at [H3].

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

girl and B to meet after which B was arrested.¹⁷⁷ Even though the girl was a willing participant the court recognised that an ‘aggravating feature of [the] case was that the offender was very much older than the girl.’¹⁷⁸ In the words of the court:

One of the perils of the misuse of the internet by an older man is that he can groom an immature girl into believing that she is much more mature than she is, and to give her the false confidence that she can behave and should be treated, and would indeed be treated by him, as if she were an adult. The process can be very exciting and seductive to an immature girl.¹⁷⁹

Again, the court confirmed the statements made in the *Wheeler* case and agreed that a clear message of disapproval needed to be sent.¹⁸⁰ The court then considered various issues regarding the sentence imposed by the trial court of eight months.¹⁸¹ The court recognised that eight months’ imprisonment ‘did not adequately reflect the grooming element of [the] case.’¹⁸² Due to the fact that the eight month sentence had been served and the principle of double jeopardy, the court decided not to increase the sentence, but ordered that B should not be allowed to do any work with children.¹⁸³

In the abduction case of *David Morgan* the court discussed an aspect of the relationship between M and the victim which involved establishing contact over the internet.¹⁸⁴ The court stated that ‘it [was] a measure of the concerns of Parliament that the Sexual Offences Act 2003 provide[d] a new offence (section 15) of meeting a child following sexual grooming’ and referred to the internet as ‘provid[ing] a sexual predator with opportunities to take advantage of the vulnerable and the easily persuaded.’¹⁸⁵

In the case of *John Mansfield*, a 42 year old man came into contact with a 13, nearly 14, year old girl via an internet chat room.¹⁸⁶ Further contact was established

¹⁷⁷ *Ibid.*

¹⁷⁸ *Attorney General's Reference No. 127 of 2004 (David Michael Briggs)* (n 174) at [7]-[8]

¹⁷⁹ *Attorney General's Reference No. 127 of 2004 (David Michael Briggs)* (n 174) at [8].

¹⁸⁰ *Attorney General's Reference No. 127 of 2004 (David Michael Briggs)* (n 174) at [9].

¹⁸¹ *Attorney General's Reference No. 127 of 2004 (David Michael Briggs)* (n 174) at [10]-[19].

¹⁸² *Attorney General's Reference No. 127 of 2004 (David Michael Briggs)* (n 174) at [20].

¹⁸³ *Attorney General's Reference No. 127 of 2004 (David Michael Briggs)* (n 174) at [21]-[22].

¹⁸⁴ *Regina v David Morgan* [2005] EWCA Crim 1574 at [13].

¹⁸⁵ *Ibid.*

¹⁸⁶ *Regina v John Mansfield* [2005] EWCA Crim 927 at [2].

through emails, telephone conversations and text messages.¹⁸⁷ M passed himself off as a 17 year old boy and the girl claimed she was 15 turning 16.¹⁸⁸ Her mother found an explicit text message on her phone and subsequently telephoned M, who managed to convince her that he was 17 years old.¹⁸⁹ The mother tried to warn him off.¹⁹⁰ She did not succeed as M then told the girl how old he really was, and they agreed to meet up.¹⁹¹ M travelled from his home to meet the girl.¹⁹² Sexual activity followed during this meeting and another meeting.¹⁹³ The girl's family contacted her on her cellular telephone and convinced her to notify the police, which she did and M was subsequently arrested.¹⁹⁴ He was convicted under s 15 of the Sexual Offences Act 2003.¹⁹⁵ M received a total sentence of three years and 9 months for the various offences.¹⁹⁶

Canada

In the case of *R v C*, one of the counts against C involved the grooming of a 13 year old boy by C using the internet after having met in person.¹⁹⁷ The two communicated via a chat line and when the conversation turned sexual, the boy informed his mother who alerted the police.¹⁹⁸ In subsequent monitored discussions C tried to groom the boy for sex.¹⁹⁹ Investigations occurred and C was eventually arrested and successfully charged, one of the offences being luring a child by means of a computer system.²⁰⁰

R v Brown was an abduction case involving the use of a computer to facilitate the abduction.²⁰¹ The court recognised that 'this [was] not the typical Internet luring case involving identifiable sexual grooming or other direct acts of sexualization' as no

¹⁸⁷ Ibid.

¹⁸⁸ *Regina v John Mansfield* (n 186) at [3].

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ *Regina v John Mansfield* (n 186) at [4].

¹⁹² Ibid.

¹⁹³ *Regina v John Mansfield* (n 186) at [5]-[7].

¹⁹⁴ *Regina v John Mansfield* (n 186) at [7].

¹⁹⁵ *Regina v John Mansfield* (n 186) at [1].

¹⁹⁶ *Regina v John Mansfield* (n 186) at [21].

¹⁹⁷ *R v C 2003* CarswellBC 1677 at [8].

¹⁹⁸ *R v C* (n 197) at [8]-[9].

¹⁹⁹ *R v C* (n 197) at [10].

²⁰⁰ *R v C* (n 197) at [1] and [10]-[13].

²⁰¹ *R v Brown 2006* CarswellOnt 2329 at [1] and [3].

sexual acts occurred between the parties.²⁰² The use of the internet in the commission of the offence was considered to be an aggravating feature.²⁰³ The court stated that:

the computer and Internet permit an offender who [was] so inclined to reach into the home -- a traditional place of safety and privacy -- without the knowledge of a parent. It [was] as though he had entered the home in person. The surreptitious and invasive nature of this kind of offence [was] particularly aggravating.

In the case of *R v Kydyk*, K communicated with an undercover police officer over the internet who was posing as a 13 year old girl called Jessica.²⁰⁴ They ‘met’ in a chatroom called ‘Seven Plus Girls Curious About Sex’.²⁰⁵ After having sent pornographic images and having several conversations, K arranged to meet with the girl, but failed to show up at the meeting.²⁰⁶ He was arrested with a condom in his pocket at the next meeting that was arranged.²⁰⁷ The court stated very strongly that ‘[c]onsequences can be catastrophic, especially where, as here, the sexually explicit talk progresses past the fantasy talk, to a face-to-face meeting where the risk of physical sexual offenses being committed become a more real risk.’²⁰⁸ A nine-month sentence on the luring charge was handed down.²⁰⁹

In the case of *R v Deck*, D, who was 37 at the time, met a mentally impaired 13 year old girl in a chat room and passed himself off as 29.²¹⁰ After some discussion they agreed to meet and sexual activity occurred on two separate occasions.²¹¹ The court recognised ‘a growing recognition of the new vulnerability of children created by the internet’ and was of the opinion that ‘[t]he one-year sentence for luring might have been higher’.²¹²

²⁰² *R v Brown* (n 201) at [103].

²⁰³ *R v Brown* (n 201) at [100].

²⁰⁴ *R v Kydyk* 2005 CarswellOnt 6530 at [2].

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *R v Kydyk* (n 204) at [20].

²⁰⁹ *R v Kydyk* (n 204) at [22].

²¹⁰ *R v Deck* 2006 CarswellAlta 365 at [2].

²¹¹ *R v Deck* (n 210) at [4]-[5].

²¹² *R v Deck* (n 210) at [31] and [33].

In the case of *R v Legare*, L, a 32 year old male, met a 12 year old girl via a chat room and passed himself off as 17 years old.²¹³ The two engaged in sexual discussion and agreed that they would like to have sexual intercourse.²¹⁴ L was not guilty on the charge of luring.²¹⁵ The judge could not extend the behaviour that occurred to fit into the requirements of s 172.1 of the Canadian Criminal Code.²¹⁶ However, the court made pertinent observations which should be taken into account in the future. The court referred to ‘the dangers to which children using the Internet are exposed, and the need to protect them’ and made reference to a United Nations study which states that ‘a distinctive aspect of interaction in cyberspace that facilitates the grooming process is the rapid speed with which communications can become intimate’.²¹⁷ In the opinion of the court, grooming would involve the following behaviours: inquiry into the home situation, inquiry ‘as to whether the child has ever run away from home’, sexually explicit conversation, suggestion to meet and suggestion by the adult that they would travel to meet the child’.²¹⁸

Australia

In the case of *R v Dagwell*, a 47 year old man made contact with a 13 year old girl via an internet chat room.²¹⁹ He passed himself off as a 21 year old man.²²⁰ The two parties communicated via email and cellular telephones.²²¹ These communications were often sexual in nature.²²² The parties agreed to meet and sexual activity occurred during the first and subsequent meetings.²²³ In the words of the court ‘this was not a case where a vulnerable man found himself suddenly and by chance in the company of a promiscuous child’.²²⁴ The court recognised that ‘the relationship commenced by reason of the offender's participation in a chat room on the net’.²²⁵ A charge of grooming was not laid, but the court stated that there was room for an ‘argument as to whether the respondent was “grooming” the child’ and

²¹³ *R v Legare* 2006 CarswellAlta 407 at [3].

²¹⁴ *R v Legare* (n 213) at [4].

²¹⁵ *R v Legare* (n 213) at [22]-[23].

²¹⁶ *R v Legare* (n 213) at [15].

²¹⁷ *R v Legare* (n 213) at [9] and [14].

²¹⁸ *R v Legare* (n 213) at [13].

²¹⁹ *Regina v Colin Charles Dagwell* [2006] NSWCCA 98 at [6].

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Regina v Colin Charles Dagwell* (n 219) at [7]-[12].

²²⁴ *Regina v Colin Charles Dagwell* (n 219) at [36].

²²⁵ *Regina v Colin Charles Dagwell* (n 219) at [22] and [36].

took note of the fact that ‘the relationship arose from the respondent’s activity on the Internet site’ and that D disguised his age.²²⁶

In the case of *R v Hays*, H, who said he was 29, made contact with a police officer in a chat room whom he believed to be a 13 year old girl.²²⁷ After some discussion, he performed sexual acts for the girl via his web camera.²²⁸ During the next discussion H said that he was 18.²²⁹ H asked for names of her friends in order to communicate with them, which he did.²³⁰ H was arrested, convicted and sentenced to eighteen months imprisonment; one of the charges being using the internet with intent to procure a person he believed was under 16 years of age to engage in a sexual act.²³¹ The court noted that ‘[t]he graphic, salacious nature of what [he] said, and did, if directed to a truly vulnerable 13 year old girl, would have carried serious potential to corrupt.’²³² Appeal against the sentence was not allowed.²³³

Legislation versus the common law

It was mentioned above that the common law crime of *crimen iniuria* and indecent assault could be used to prosecute an instance of grooming, but preferably *crimen iniuria*.²³⁴ It has been shown that the legislature is moving towards a statutory response to the problem of grooming possibly because there seem to be ‘insurmountable difficulties in extending the definitions of common-law crimes to so-called computer crimes.’²³⁵ However, Burchell points out that there is a distinction between crimes involving computers as a tool and computers as the object or victim in which case personality would have to be attributed to a machine.²³⁶ Grooming would be a crime involving a computer as a tool such as a telephone or a fax machine, and therefore, in Burchell’s opinion, should be prosecuted using the common law.

²²⁶ *Regina v Colin Charles Dagwell* (n 219) at [36].

²²⁷ *R v Hays* (n 122) at [2].

²²⁸ *Ibid.*

²²⁹ *R v Hays* (n 122) at [3].

²³⁰ *Ibid.*

²³¹ *R v Hays* (n 122) at [1].

²³² *R v Hays* (n 122) at [22].

²³³ *R v Hays* (n 122) at [42].

²³⁴ Burchell (n 90) at 740 and 750.

²³⁵ Buys (n 79) at 320.

²³⁶ Buys (n 79) at 321.

Clause 17 of the Criminal Law (Sexual Offences) Amendment Bill is a clear indication from the legislature that it is taking a different view to Burchell and has possibly not considered the subtle difference between a computer as a tool in a crime and a computer as an object or ‘victim’ of a crime.²³⁷ The legislature needs to carefully consider the pitfalls of the legislation by possibly comparing the clause to the UK legislation as the wording of the offence embodied in clause 17 is very similar to the offence contained in s 15 of the Sexual Offences Act 2003 of the United Kingdom.²³⁸ We can look at the weaknesses of the UK legislation in order to better understand the problems within clause 17.

Proving intention will be an issue.²³⁹ As has been said before, if the offender is in possession of sexual objects such as condoms or lubricants, intention can be inferred.²⁴⁰ It has been said that the offender will have to ‘proceed sufficiently down the path of seeking to commit the offence before a clear intention to commit the offence of grooming can be made.’²⁴¹ If strictly interpreted, this could mean that the offender might have to actually meet the child before being arrested, thereby putting the child in danger.²⁴² It is common knowledge that this section has been used by undercover police officers in the UK in operations to discover paedophiles, thereby showing that this interpretation has not been given to the section. It is submitted that South Africa should follow this example. There could be a defence available to the offender if communication happened online only in that if there was a reasonable belief that the child was older than 18, the offender should not be prosecuted. It must be noted that there might be evidential difficulties which are outside the scope of this discussion.²⁴³

Children are being targeted and exploited in their own homes and this disturbing fact has been recognised by countries around the world. There is only so

²³⁷ Updated version (working document) of the Criminal Law (Sexual Offences) Amendment Bill [B20-2003] available at <http://www.pmg.org.za/bills/060619b50-03.htm> (accessed 08 September 2006) clause 17.

²³⁸ Ibid; Sexual Offences Act s 15.

²³⁹ Arfan Khan ‘Sexual Offences Act 2003’ (2004) 68 *Journal of Criminal Law* 220 at 224; Gillespie (n 43) at 244.

²⁴⁰ Sexual Offences Act Explanatory Notes (n 107) at para 29; Gillespie (n 43) at 245.

²⁴¹ Khan (n 239) at 244.

²⁴² Ibid.

²⁴³ Khan (n 239) at 245.

much that education of parents will achieve and if parental protection fails there has to be recourse for a child who is groomed and thus psychologically abused. It is submitted that the proposed clause that will criminalise grooming in the Criminal Law (Sexual Offences) Amendment Bill might be a step forward in the right direction for advancing protection of children and their rights in that the clause might create an awareness of the problem of grooming and especially grooming online, but the legislature should carefully consider the issues outlined above, especially that of the computer being a tool in these situations. The legislature might come to the realisation that there is no good reason why a statutory provision should be enacted to cover a criminal situation that the common law currently adequately covers.

Conclusion

It has been shown that the grooming of children online is a real issue. There is no data to show that grooming online is a rampant problem in South Africa, yet. This does not mean that there are not instances of grooming online occurring. Grooming is an assault upon the dignity of a child and fundamentally affects children's development and psyche. It has been submitted that clause 17 of the Criminal Law (Sexual Offences) Amendment Bill might be a step forward in the right direction toward criminalising grooming and dealing with all aspects of the process, however this might be an unnecessary intervention by the legislature as the common law crime of *crimen iniuria* adequately covers grooming. Even though this clause is favourably comparable to legislation in foreign jurisdictions where laws such as this have been shown to be an effective way of dealing with grooming and specifically grooming online, it is submitted that using the common law crime of *crimen iniuria* is the appropriate way of dealing with this problem.

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