



By Dr Gregor Urbas

THREAT on the NET!

Online child-grooming in Australia

One of the more concerning misuses of the internet involves adults communicating with children and teenagers in order to procure or groom them for sexual contact. While not every sexually suggestive or even explicit communication with an under-aged recipient leads to a physical meeting or contact, this is the actual or clearly intended result in a substantial number of cases that have emerged over recent years.

Internationally, the issue of child grooming using the internet came to public attention with the case of former US marine, Toby Studabaker, who in 2004 was convicted of abducting and having sex with a 12-year-old girl he met in an online chatroom. Studabaker groomed the girl through subsequent online exchanges of an increasingly sexual nature, and convinced her to meet him in the UK for this purpose, and the two then flew to Paris, staying in a hotel and having sex, before travelling by train to Strasbourg. Studabaker was arrested by German authorities in Frankfurt and extradited to the UK to face charges of abduction and incitement to gross indecency.¹

In response to such events, legislatures have moved to establish offences criminalising the misuse of the internet to procure or groom children for sexual purposes. Most notably in Australia, the Commonwealth added a range of new internet-related offences to its Criminal Code in 2004, with effect from 1 March 2005, including offences relating to child pornography and child abuse material, as well as child procuring and grooming.

COMMONWEALTH CRIMINAL CODE OFFENCES

Section 474.26 (Using a carriage service to procure persons under 16 years of age) makes it an offence for a person (the *sender*) to use a carriage service (which includes the internet as well as other electronic facilities, such as phone and SMS texting) to transmit a communication to another person (the *recipient*), with the intention of procuring the recipient to engage in sexual activity with the sender or another person, or in the presence of the sender or another person, where the sender is at least 18 years of age and the recipient is or is believed by the sender to be under 16 years of age. An offence under s474.26 is punishable by imprisonment of 15 years.

Section 474.27 (Using a carriage service to 'groom' persons under 16 years of age) 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 making it easier to procure the recipient to engage in sexual activity with the sender or another person, or in the presence of the sender or another person, where the sender is at least 18 years of age and the recipient is or is believed by the sender to be under 16 years of age. An offence under s474.26 is punishable by imprisonment of 12 years, or 15 years for a form of the offence involving sexual activity with or in the presence of other persons.

Section 474.27A (Using a carriage service to transmit indecent communication to person under 16 years of age) makes it an offence for a person (the *sender*) to use a carriage service to transmit a communication to another person (the *recipient*) which includes material that is indecent, where the sender is at least 18 years of age and the recipient is or is believed by the sender to be under 16 years of age. An offence under s474.26 is punishable by imprisonment of eight years. (Before the addition of s474.27A in 2010, the offences in s474.27 made reference to communications including indecent material).

Finally, s474.28 makes it an element of absolute liability

The term 'grooming' denotes the earlier, preparatory stage of this process; 'procuring' denotes the second stage.

that the recipient involved in the offences under ss474.26 – 474.27A is under the age of 16 years (meaning that the prosecution does not have to prove a fault element in relation to this physical element). However, s474.29 provides a statutory defence if the defendant can prove that, at the time the communication was transmitted, s/he believed that the recipient was at least 16 years of age. The defendant bears a legal burden in relation to this defence, with the standard being the balance of probabilities.

The rationale for distinguishing between procuring and 'grooming' was explained in the Explanatory Memorandum to the 2004 Bill introducing the relevant provisions:

'Proposed sections 474.26 - 474.29 contain an offence regime targeting adult offenders who exploit the anonymity of telecommunications services (for example, the internet) to win the trust of a child as a first step towards the future sexual abuse of that child. The practice is known as "online grooming"'. >>

ENGINEERING and ERGONOMICS EXPERTS

Mark Dohrmann and Partners Pty Ltd

Mark and his consulting team:

- assist many Australian law firms in their personal injury matters
- have prepared over 6,000 expert reports on public and workplace accidents
- appear regularly in court in several States
- give independent expert opinions, including
 - ✓ back and upper limb strains;
 - ✓ machinery incidents;
 - ✓ slips and falls;
 - ✓ RSI; and
 - ✓ vehicle accidents



Mark is a professional engineer, a qualified ergonomist and has been an Australian Lawyers Alliance member for several years.

The firm's consulting division has also advised over 2,000 enterprises since 1977 in safety, engineering and ergonomics



Details, brief CVs and a searchable list of cases can be found at www.ergonomics.com.au

(03) 9376 1844 info@ergonomics.com.au

Mark Dohrmann and Partners Pty Ltd PO Box 27, Parkville VIC 3052

Search Mark's cases by keyword at: www.ergonomics.com.au

Defendants must prove that, at the time of communication, they believed recipients to be at least 16.

There are two steps routinely taken by adult offenders leading up to a real life meeting between adult and child victim that results in child sexual abuse:

- (i) The adult wins the trust of a child over a period of time. Adults often use “chat rooms” on the internet to do this. They may pose as another child, or as a sympathetic “parent” figure. Paedophiles reportedly expose children to pornographic images as part of this “grooming” process. It is proposed to specifically criminalise this practice. Specific offences would remove any doubt about whether online “grooming” of a child before actual contact is “mere preparation” (that is, not a criminal offence) or an unlawful attempt to commit child sexual abuse.
- (ii) With the child’s trust won, adults often use telecommunications services to set up a meeting with the child. Although this step is more likely to be characterised as an attempt to commit child

sexual abuse than step (i), it is desirable to provide a firm justification for police action by enacting specific “procurement” or “solicitation” offences. This is consistent with the underlying rationale for the new offences: to allow law enforcement to intervene before a child is actually abused.²

The Commonwealth legislation thus uses the term ‘grooming’ to denote the earlier, preparatory stage of this process (in which indecent content may be involved in the communication), and the term ‘procuring’ to denote the second stage (intended to lead to contact). Other legislatures, including some overseas, use only one or another term, or synonyms such as ‘luring’ to describe the preparatory conduct. In the absence of specific offences, the doctrine of attempt may in some cases be relied upon.

OFFENCES IN OTHER JURISDICTIONS

Although Commonwealth law is assuming an increasingly dominant place in the regulation of the internet, the Australian states and territories also have various laws relating to child grooming, some of which specifically refer to carriage services or electronic communications.³ In fact, some of these provisions (such as those in the Queensland Criminal Code) predate the Commonwealth offences and provided a useful model for the latter.

Australian child-procuring and grooming offences using the internet

	Provision	Main elements	Maximum penalty	Definition of a child or young person by age
CTH	<i>Criminal Code Act 1995</i> , s474.26 ('procure')	Using a carriage service to transmit a communication to another person who is, or is believed to be, under 16 years old, with the intention of procuring the recipient to engage in, or submit to, sexual activity	15 years' imprisonment	Under 16 years of age
	<i>Criminal Code Act 1995</i> , s474.27 ('groom')	Using a carriage service to transmit a communication to another person who is, or is believed to be, under 16 years old, with the intention of making it easier to procure the recipient to engage in, or submit to, sexual activity	12 years' imprisonment; or 15 years' imprisonment if s474.27(3) applies (grooming a child for another person)	Under 16 years of age
	<i>Criminal Code Act 1995</i> , s474.27A ('indecent communication')	Using a carriage service to transmit a communication including indecent material to another person who is, or is believed to be, under 16 years old	8 years' imprisonment	Under 16 years of age
ACT	<i>Crimes Act 1900</i> , s66(1)	Using electronic means, 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	10 years' imprisonment (5 years' imprisonment for a first offence)	Under 16 years of age
	<i>Crimes Act 1900</i> , s66(2)	Using electronic means, send or make available pornographic material to a young person	5 years' imprisonment or 100 penalty units, or both	Under 16 years of age

	Provision	Main elements	Maximum penalty	Definition of a child or young person by age
NSW	<i>Crimes Act 1900</i>	No specific provisions; see Division 14A (Procuring or grooming) and Division 15 (Child prostitution and pornography)	Various	Under 16 years of age (some increased penalties apply if under 14 years of age)
NT	<i>Criminal Code Act, s131</i>	No specific provisions; see s131 (attempting to procure child under 16 years)	3 years' imprisonment (5 years' imprisonment if offender adult)	Under 16 years of age
QLD	<i>Criminal Code Act 1899, s218A</i>	Using electronic communication (defined as 'email, internet chat rooms, SMS messages, real time audio/video or other similar communication') with intent to procure a person who is, or is believed to be, under 16, to engage in a sexual act	5 years' imprisonment (10 years' imprisonment if person intended to be procured is, or is believed to be, under 12)	Under 16 years of age
SA	<i>Criminal Law Consolidation Act 1935</i>	No specific provisions; see s63B (procuring child to commit indecent act, etc)	12 years' imprisonment for aggravated offence; 10 years' imprisonment for basic offence	Under 16 years of age
TAS	<i>Criminal Code Act 1924, s125D</i>	Making a communication by any means with the intention of procuring a person under the age of 17 years, or a person the accused person believes is under the age of 17 years, to engage in an unlawful sexual act	At the discretion of the sentencing court, up to 21 years' imprisonment	Under 17 years of age
VIC	<i>Crimes Act 1958</i>	No specific provisions; see s70AC (sexual performance involving a minor)	10 years' imprisonment	Under 18 years of age
WA	<i>Criminal Code, s204B</i>	Using electronic communication (defined to include 'data, text or images') with intent to procure a person who is, or is believed to be, under 16 to engage in sexual activity; or exposing a person under 16 to indecent matter	5 years' imprisonment (10 years' imprisonment if person is, or is believed to be, under 13)	Under 16 years of age

Source: Australasian Legal Information Institute (AustLII): <http://www.austlii.edu.au/>

FICTIONAL CHILD ENTITIES AND POLICE 'STING' OPERATIONS

It is notable that, at least under some of the statutory formulations of child grooming offences, no real child need be involved in the commission of the child grooming crime. This allows investigators to go online posing as a child, gathering evidence that may be used in a subsequent prosecution.⁴ This is a deliberate legislative strategy, based on the reasonable proposition that it is in the public interest that sexual predators be identified and apprehended before actual children are either harmed or put at risk. As noted by the Chief Justice of the Australian Capital Territory (ACT) in a recent case, the community

attitude to child sex offences and offenders 'would support the use of covert operations to detect them in a manner that does not place an actual young person at risk' and it is surely better 'that the victim be an adult posing as a child than an actual young person who receives and responds to such communications'.⁵

R v Kennings

In the first investigation under the Queensland offence in s218A after it came into effect in 2003, police posed as a 13 year-old girl ('becky_boo 13') in a chatroom and received emails from a man wanting to engage the girl in sexual activity. They arrested a 25-year-old man when he appeared >>

at an agreed meeting point to meet the girl, only to find that he had been chatting to police all along. After a guilty plea, the defendant was sentenced to imprisonment for two-and-a-half years, suspended after having served nine months. This was reduced on appeal to an 18-month term, suspended from the time of the appeal, the defendant having already served 90 days in custody.⁶

R v Shetty

In another Queensland case, however, in which police posed as a 14 year old ('Kathy_volleyball'), a conviction under s218A was overturned on appeal on the basis that the provision requires that the defendant believes that s/he is contacting someone under the age of 16 years. In this case, the defendant had given evidence that he had held no belief as to the age of Kathy_volleyball. The Court of Appeal held that the jury had been misdirected on the application of s218A(8), which provides that evidence that a person (real or fictitious) was represented as being below a certain age is, in the absence of evidence to the contrary, proof that the adult believed the person was under that age.⁷

R v Gajjar

In this Victorian case, the offender communicated with a person whom he believed was a 14-year-old girl, but was actually an undercover police officer, and initially presented himself to be a 20-year-old female. Subsequently, he admitted to being male, and sought to arrange a meeting. On being arrested and pleading guilty to an offence under s474.26, he was sentenced to two years and six months and was required to serve eight months. An appeal against severity of sentence was dismissed, with the Court of Appeal noting that in cases of procuring for sexual purposes, it is appropriate to give paramount consideration to the principle of general deterrence, and it is therefore open to a sentencing judge to give less weight to prior good character than it might otherwise bear.⁸

R v Stubbs

In this ACT case, the accused had communicated in online chats and by email with 'missTufsey14, Roxanne Taylor', represented to be a 14-year-old girl, who was in reality Detective Stephen Waugh of New Zealand Police based in Auckland, New Zealand. The communications from the accused became more sexually suggestive and he suggested a meeting with 'Roxanne' at the Jolimont Centre in Canberra. The Australian Federal Police (AFP) was informed and an arrest followed. At a preliminary hearing, the accused pleaded not guilty to two counts under ss474.26 (using a carriage service to procure persons under 16 years of age) and 474.17 (using a carriage service to menace, harass or cause offence) of the *Criminal Code Act 1995* (Cth), and raised a number of interesting arguments in support of the proposition that the prosecution's evidence should be excluded as having been illegally or improperly obtained. These arguments were unsuccessful, the Chief Justice finding that there had been no illegality or impropriety, as the police followed a policy and procedure

document entitled *Principles of Practice for Investigating On-Line Grooming of Children Under 16*, which is reproduced in full in the court's judgment.⁹

R v Fuller

In this NSW case, an ordained priest pleaded guilty to an offence under s474.26, after being discovered by police using a chat and webcam facility to communicate with what he thought was a 13-year-old girl – in reality, a fictitious identity created by police using a profile photograph of a teenager. Following several communications, including episodes during which the offender exposed himself via webcam, he arranged to meet her at a Parramatta location and was arrested. An initial fixed sentence of six months was imposed in the District Court, but the Crown successfully appealed, arguing that this was manifestly lenient. The sentence was increased to 18 months, with release on a good behaviour bond after six months, and the laptop computer and Bluetooth equipment used were forfeited under the *Proceeds of Crime Act*. Interestingly, McLellan CJ at CL clarified the sentencing approach to be taken in cases involving fictitious identities, stating that: "Although the presence of an actual victim may aggravate the offence, the absence of a victim will not mitigate it."¹⁰

In all of these cases, and others of a similar nature, police have been able to interact with and identify offenders who are in the process of communicating with a person they believe to be a child under 16 years of age. The legislation is drafted to allow such 'stung' operations, and defence arguments about entrapment or improper investigative practice tend to be unsuccessful. Importantly, child-grooming provisions can also be used where the alleged attempted contact with a child occurs across state or even national borders. For example, two men from Sydney and Perth were extradited to the ACT in 2007 to face charges relating to the use of the internet to groom a Canberra teenager.¹¹ It was also reported by NSW Police in 2007 that a man was charged with child-grooming offences after 'explicit photographs and messages were allegedly sent to a teenage boy in the US via the internet'.¹²

Unfortunately, law enforcement cannot always prevent harm from occurring to children at the hands of internet predators. In a recent case in South Australia, an offender communicated with a teenage girl by posing online as a young musician and won her trust, subsequently murdering her. Media reports about the trial evidence suggested that there was significant online interaction between the offender and the victim, as well as previous grooming attempts involving other teenage girls in other countries, and that the offender had been enraged because one of these girls had not met with him in Singapore as had been arranged in their online communications.¹³ Recognising that community education must also play a role in crime prevention, police and the computer industry have recently become involved in initiatives such as the creation of the 'ThinkUKnow' website promoting child and parental awareness of the risks of internet child grooming.¹⁴

CONCLUSION

Internet child grooming is a serious issue requiring a concerted response. Australian legislatures have made a strong contribution by enacting offence provisions that not only capture the misuse of the internet to prey on actual child victims, but also those cases where the recipient of communications is believed to be a child, but is in reality an adult such as an undercover police officer. Numerous convictions have resulted over recent years, and courts are beginning to develop sentencing principles recognising the importance of general deterrence in this area of online offending. ■

This article has been peer-reviewed in line with standard academic practice.

Notes: **1** BBC News (2004). 'Ex-marine jailed for abduction', 2 April: <http://news.bbc.co.uk/1/hi/england/manchester/3594235.stm>. **2** Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004 (Cth). **3** See G Urbas, 'Look who's stalking: Cyberstalking, online vilification and child grooming offences in Australian legislation', *Internet Law Bulletin*, vol.10, No. 6, 2008, pp62-7; see also Kim-Kwang Raymond Choo, 'Online child grooming: A literature review of the misuse of social networking sites for grooming children for sexual offences', Australian Institute of Criminology, Research and Public Policy Series, No.103, 2009: <http://www.aic.gov.au/documents/3/C/1/%7B3C162CF7-94B1-4203-8C57-79F827168DD8%7Drpp103.pdf>. **4** See T Krone, 'Queensland police stings in online chatrooms', *Trends and Issues in Crime and Criminal Justice*, no. 301, Australian Institute of Criminology (AIC), 2005: <http://www.aic.gov.au/publications/tandi2/tandi301.html>. **5** *R v Murray Colin Stubbs* [2009] ACTSC 63 (26 May 2009), per Higgins CJ at [69] – [71], citing the Gospel of St Matthew (18:6): But who so shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea (see *Mark 9:42; Luke 17:2*). **6** *R v Kennings* [2004] QCA 162 (14 May 2004). **7** *R v Shetty* [2005] QCA 225 (24 June 2005). A retrial returned a verdict of acquittal in September 2006. **8** *R v Gajjar* [2008] VSCA 268 (18 December 2008) at [27]. **9** *R v Murray Colin Stubbs* [2009] ACTSC 63 (26 May 2009). At trial, a jury found the defendant not guilty of the s 474.26 procuring charge but guilty under the lesser s474.17 charge. **10** *R v Fuller* [2010] NSWCCA 192 (22 October 2010) at [35]. **11** See ABC Online, 'Man to be extradited over child sex grooming charge', 25 July 2007: <http://www.abc.net.au/news/stories/2007/07/25/1988353.htm?site=canberra>. **12** See NSW Police Online, 'Man charged with child grooming offences – child exploitation internet unit', 28 March 2007: http://www.police.nsw.gov.au/news/media_release_archives. **13** See G Urbas, 'Protecting children from online predators: The use of covert investigation techniques by law enforcement', *Journal of Contemporary Criminal Justice*, vol.26, No. 4, 2010, pp410-25. **14** ThinkUKnow website: <http://www.thinkuknow.org.au/site/> (developed for Australia by the Australian Federal Police and Microsoft Australia).

Dr Gregor Urbas is a Senior Lecturer in Law at the ANU College of Law, Australian National University, Canberra, ACT.
 EMAIL Gregor.Urbas@anu.edu.au

The closest you can get to actually being there.



What really happened? Ask InterSafe. We will provide you with unmatched technical knowledge and interpretation of evidence, as we have done for 500 legal firms across Australia in 10,000 forensic reports. We promise outcome-focussed energy, right from the first interview with the persons involved to the final report. Being engineers, our large staff of consultants has practical appreciation of relevant factors in their

specific areas of experience. The understanding you get will be deep. The opinions you get will be irreproachable. The reports you get will be legally rigorous. And our experience covers virtually all aspects of workplace, public liability, product liability and motor vehicle accidents.

Contact us now to discuss your next case. It's the closest you can get to actually being there. Phone 1800 811 101. www.intersafe.com.au



InterSafe

Engineering safer workplace solutions.