

Online child exploitation: Challenges and future research directions

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Abstract

Given the relatively new phenomenon of online child exploitation – an important area of criminological concern, it is difficult to obtain long term trend data on reported convictions. However, studies and recent cases demonstrate clearly there has been a large increase in use of information and communications technologies (ICT), such as social networking sites, creating greater opportunity for sexual offenders. Existing legislative and prosecution-based approaches, while important, are unlikely to be adequate. Our analysis of Australia and United Kingdom’s legislative and prosecution-based responses, for example, highlights the need for clear national and international definitions and procedures for the collection of data on the various offences of online child exploitation. The latter will contribute to a more coherent approach in collating data and help to ensure that government policy is responsive to trends in online child exploitation activities. We also identify five potential research questions.

Keywords

Child Sexual Exploitation, Online Child Exploitation, Routine Activity Theory

1. Cyber danger

A rhetoric of free expression rules cyberspace, but the reality is that cyberspace can also be used as an extension to facilitate and enhance traditional forms of crime as well as create new forms of malicious cyber activities. For example, social media channels such as Facebook and Twitter have allowed individuals to develop personal online profiles and voice their opinions easily without the need to go through intermediaries (e.g. printed media), and be used as a medium for propaganda such as publishing doctrines promoting extremism activities, recruitment and training of potential terrorists, and transferring information (Choo 2011).

The Routine Activity Theory explains that crime occurs when a suitable target is in the presence of a motivated offender and is without a capable guardian (Cohen & Felson 1979). The theory draws on rational exploitation of ‘opportunity’ in the context of the regularity of human conduct to design prevention strategies, especially where terrestrial interventions are possible. It assumes that criminals are rational and appropriately resourced actors that operate in the context of high-value, attractive targets protected by weak guardians (Felson 1998; Yar 2005); and that victimisation risk is a function of how one (victim) patterns their behaviour and lifestyle. In the context of online child exploitation, the interaction between child sex offenders and financially-motivated criminals (e.g. motivations) and situational conditions (e.g. opportunities and weak guardianship) can have great influence on the situation.

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1.1 Presence of opportunities and motivations

The potential for individuals with an inappropriate sexual interest in children to establish online contact with them for the purpose of sexual abuse represents a very real threat to the safety of children. In October 2011, for example, an individual in the United States (U.S.) was sentenced to 132 months imprisonment for the sex trafficking of a [16-year old] female juvenile. It was alleged that the accused person ‘trolled social networking sites and then lured and groomed a juvenile girl into his prostitution business ... advertise[d] her as a prostitute on the Internet [and between] March to May 2011, prostituted the victim in northern Virginia and Maryland. When clients paid the teenage girl for sexual acts she performed, she turned over the money to the offender, who would give her a percentage of the fee charged to the client’ (FBI 2011c: np).

Individuals with an inappropriate sexual interest can also communicate with other like-minded individuals who know each other only online, share information and strategies for exploiting children more easily, and in so doing, reinforcing adult-child sex philosophies of offenders. In addition, cyberspace facilitates access to child exploitation materials that were once difficult to locate, and provide instant access to children from all over the world or within the country. Similar concerns were raised in a 2009 report by the Australian Government Attorney-General’s Department, which noted that it is relatively easier to procure children ‘to engage in sexual activities using the Internet, without ever being in the physical presence of the child victim. For example, an offender may use the Internet to groom or procure a child to perform a sexual activity via web cam. Or the offender may email a child asking him or her to masturbate in front of a web camera, while the offender (or another adult) watches over the Internet’ (Australian Government Attorney-General’s Department 2009: 48). Examples include:

- In the U.S. in December 2011, two individuals (husband and wife) were charged with sex trafficking of teenage females. It was alleged that both accused persons ‘recruited teenage females by promising money, drugs, and a “family-like environment,” maintained control over them by providing drugs, using physical force and threats of physical force, and fostering a climate of fear, and used the Internet to advertise their prostitution enterprise, which spanned from Sacramento County to multiple Bay Area counties’ (FBI 2011a).
- Also in the U.S. an individual was sentenced to 121 months imprisonment, followed by a lifetime of supervised release (although it is not clear how the latter will be enforced as the accused person is an illegal alien in U.S. and most likely will be deported out of the country upon completion of his sentence) ‘after having been convicted of attempting to entice and coerce a minor to have sex with him (Count 1) and attempting to receive child pornography from that same minor (Count 2)’. It was alleged that the accused person ‘posted a lewd and sexually explicit classified advertisement on Craigslist.org seeking a casual sexual encounter’, and responding to an undercover FBI agent (posing as an underage girl)’s response (FBI 2011b: np).

1.2 Absence of capable guardianship

Children are often unsupervised online – an observation confirmed in the State of the Net survey (Consumer Reports Magazine 2011), which found “[a]mong young users, more than 5 million were 10 and under, and their accounts were largely unsupervised by their parents”. They are particularly vulnerable to exploitation via cyberspace, due to a number of reasons including;

- The lack of visual cues in cyber space that may assist them in making judgments about the suitability, trustworthiness and sincerity of those they are communicating with (Wells & Mitchell 2007); and
- Children are often at a stage of learning how to communicate effectively and hence less likely to be as socially skilled as adults (Lamb & Brown 2006; Olson, Daggs, Ellevold & Rogers 2007).

Child sexual exploitation can take many forms, and children may also engage in illegal behaviour themselves, such as taking or sending explicit images or videos of oneself before forwarding the images or videos to others (an activity also known as ‘sexting’). While there is as yet little research into the exact nature and prevalence of sexting (see Bluett-Boyd, Fileborn, Quadara and Moore 2013), several surveys conducted in US suggested that sexting is an important emerging issue in the country. For example, a study commissioned by the National Campaign to Prevent Teen and Unplanned Pregnancy found that 20% of respondents aged between 13 and 19 years old and 33% of respondents aged between 20 and 26 years old have reportedly electronically sent, or posted online, nude or semi-nude pictures or video of themselves, and 15% of respondents aged between 13 and 19 years old who have reportedly sent or posted nude or semi-nude images of themselves claimed they have done so to someone they only knew online (National Campaign to Prevent Teen and Unplanned Pregnancy 2008). In countries with child pornography legislation, sexting tends to be addressed through such framework although questions remained whether this is really the most appropriate response, particularly when the offending material was taken by a minor and/or sent between minors (Humbach 2010; Jolicoeur & Zedlewski 2010). There have been several other cases where individuals (who may be considered ‘minors’ under the relevant child pornography legislation but within the age of consent under sexual offences legislation) were placed on the sex offender registry after being convicted of sexting offences (see Stevenson, Najdowski and Wiley 2013).

2. Legislative and prosecution-based approach

2.1 Australian (Commonwealth) legislation framework

To keep our children safe in the online environment, Australia has introduced specific child sexual exploitation offences that have resulted in a number of convictions. The responsibility for combating child sexual exploitation offences is shared between the Commonwealth and the state and territory governments. The former has responsibility for matters that cross state or national borders, and the state and territory governments usually have responsibility for domestic criminal matters that occur within the respective borders.

In this section, we distinguish between four groups of offences at the Commonwealth level, which are contrary to the *Criminal Code Act 1995* (Cth) and so fall within the ambit of a “child sex offence” for the purposes of the *Crimes Act 1914* (Cth). These are:

- Sexual offences (other than sexual intercourse) with children outside Australia;²
- Offences involving child pornography material or child abuse material outside Australia;³
- Offences relating to use of carriage (or postal) service for child pornography material or child abuse material;⁴ and

² *Criminal Code Act 1995* (Cth) div 272.

³ *Ibid*, div 273.

⁴ *Ibid*, divs 471, sub-div B and C; div 474, sub-divs D and F.

- Offences relating to use of carriage (or postal) service involving sexual activity with person under 16.

Where applicable, each area stated above will be compared with the law in the United Kingdom (UK).

2.1.1 Sexual offences (other than sexual intercourse) with children outside Australia

The following provisions are designed to combat the phenomenon of sex tourism by Australian citizens. This practice has been defined in various ways but may be understood briefly as the commercial sexual exploitation of children by individuals who travel from developed countries to meet children in developing countries⁵.

Under Sections 272.9(2)(1)-(2) of the *Criminal Code Act*, a person commits an offence if they engage in sexual activity (other than sexual activity) with a child under 16, or cause that child to engage in sexual activity with another person and that sexual activity was engaged in outside Australia. The applicable punishment here is a maximum term of 15 years imprisonment and is thus greater than that provided for under the old legislative provision⁶.

Both the intention and causal elements of the offence may be challenged on the facts by the defendant in an attempt to assail a charge under this section. They may argue that they did not *intend*⁷ their conduct to *cause*⁸ the child to engage in sexual activity. Alternatively they may challenge the causal nexus between their own conduct and that of the child. The use of the word 'cause' here replaced 'inducing' in the old provisions. Danielle Ireland-Piper suggests that conduct which induces a child to engage in sexual activity may be covered by s 272.19.⁹

Equally however, the use of the term 'sexual activity'¹⁰ in the new provision is wider and arguably more workable than the words used previously as it is not limited to specific examples of sexual conduct and extends beyond sexual intercourse or even physical contact. It may therefore capture a greater variety of conduct on the part of the offender¹¹. This may apply where, for example, a child unintentionally witnesses sexual activity involving the defendant and another person and the defendant is unaware of the child's presence.

Indeed, during the consultation process prior to the enactment of this section in 2010, attention was drawn to this very issue.¹² It was feared that the provision may capture everyday, innocent sexual activity. The fault element required under this section is thought to be a sufficient safeguard however. It should be noted further that an alternative defence exists

⁵ Marianna Brungs, 'Abolishing Child Sex Tourism: Australia's Contribution' (2002) 8(2) *Australian journal of human rights* 101.

⁶ *Crimes Act 1914* (Cth), as amended by *Criminal Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) s 272.9.

⁷ *ibid* s 272.9(3).

⁸ Under section 272.2 of the *Criminal Code Act 1995* (Cth), a person 'causes' another person to engage in sexual activity if it 'substantially contributes' to the other person engaging in sexual activity.

⁹ Daniele Ireland-Piper, 'Extraterritoriality and the Sexual Conduct of Australians Overseas' (2011) 22(2) *Bond Law Review* 16, 22.

¹⁰ *Criminal Code Act 1995* dictionary.

¹¹ Above n 8.

¹² Law Council of Australia, Submission No. 8 to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010, March 2010.

under s272(16)(1) where the defendant is able to establish that they reasonably believed the child to be aged over 16 years.

Section 272.14 creates an offence that prohibits conduct carried out in relation to a person who is under 16 (or if the accused believes that person to be under 16) with the intention of *procuring* the child to engage¹³ in sexual activity regardless of whether any sexual activity actually takes place. This section applies whether the child is outside or inside Australia, or the conduct occurred wholly or partly outside Australia. This section would capture a person who uses a carriage service to make contact with a child who is located inside or outside Australia (or a person the accused believes to be a child) with the intention or later meeting that child for sexual activity.

Absolute liability¹⁴ applies in relation to whether the child was under 18 at the time of the offence and the factors in section 272.14(1)(d). There is no requirement that it be physically possible for the defendant to actually engage in the sexual activity in question.¹⁵ Importantly, a person may be found guilty of an offence under section 272.14(1) even where the “child” is a fictitious person represented to the defendant as being a real person.¹⁶ This allows for the operation of sting operations against potential defendants and thus operates alongside the “child grooming” offence in section 272.10 and the controlled operations legislation set out below. A defendant convicted under section 272.14 is punishable by a maximum of 15 years imprisonment.

Section 272.15 aims to combat “child grooming” (i.e. the preparation of a child for later sexual activity contrary to the section mentioned above) by making it an offence to engage in conduct in relation to a person who is (or is believed by the accused to be) under 16 with the intention of making it easier for the accused to engage in later sexual activity with the child (where or not that child is inside or outside Australia). As with section 272.14, the conduct in question and protagonists need not be or occur in Australia for this section to apply. The maximum penalty is 12 years imprisonment.

The same analysis as applicable to section 272.14 applies here with the addendum that a prosecution under either section 272.14 or 272.15 requires proof beyond reasonable doubt that the defendant engaged in the activity with the *intention* of procuring or making it easier to procure the child to engage in sexual activity. However, a successful prosecution under either section requires proof only that the offender *believed* the child was under 16 at the time. This would provide legal protection to police operations where a fictitious child is represented to the would-be offender under a sting.¹⁷

It is a defence to a charge under section 272.9, 272.14 or 272.15 if the defendant proves under section 13.4 that at the time of the offence they believed that the child was at least 16. In determining whether such a belief was in fact held by the defendant, the trier of fact is

¹³ For the purposes of the *Criminal Code Act 1995* (Cth), dictionary section, ***engage in sexual activity***: without limiting when a person engages in sexual activity, a person is taken to engage in sexual activity if the person is in the presence of another person (including by a means of communication that allows the person to see or hear the other person) while the other person engages in sexual activity

¹⁴ Under sections 6.2(1)– (2) this means that the conduct or physical element of the offence does not carry a corresponding mental or fault element so the commission of the conduct element is sufficient to render a person guilty of the offence and no defence of ‘mistake of fact’ under section 9.2 is available. In this last respect, such offences differ from those to which ‘strict liability’ attaches (see section 6.1).

¹⁵ Section 272.14(3).

¹⁶ Section 272.14(4).

¹⁷ Above n 8.

empowered under section 272.16(4) to consider the reasonableness of the belief. For the purposes of sections 13.4 and 13.5, the legal standard of proof resting with the defendant is that of the balance of probabilities.

Section 272.17 also offers a defence where the defendant can show that they were legally married to the child at the time of the offence.

UK

The UK does not legislate for online child exploitation separately to physical child exploitation; the offences are drafted very widely in order to apply to a variety of situations. The Sexual Offences Act 2003 is the United Kingdom's principle piece of legislation in relation to sexual abuse. It covers sexual offences against all people but treats children as separate victims through a number of offences. The UK does not legislate separately for actions committed outside of its jurisdiction; Section 72(1) of the Criminal Justice and Immigration Act 2008 (UK) states that if a UK national does an act in a country outside UK, and the act, if done in England and Wales or Northern Ireland, would constitute a sexual offence to which this section applies, the UK national is guilty in that part of UK of that sexual offence. This is similar to Australian law, which also criminalises behaviour outside its borders.

Offences under the Sexual Offences Act 2003 are divided into a number of areas. These include the broadly defined sexual offences; s1 concerns 'Rape', sections 2-3 cover 'Assault', and section 4 relates to causing others to engage in sexual activity without consent. Rape and 'Assault by penetration' carry maximum sentences of life imprisonment; 'Sexual assault' and 'Causing a person to engage in sexual activity without consent' have 10 year maximum jail terms.

While these offences apply to victims of all ages, additional offences relate to specific types of victims. The first set of these offences are found in sections 5-8 which cover 'sexual offences against children under 13'.

Sexual offences (other than intercourse) against children under 13

Section 6 mirrors the s.2 offence of assault by penetration, a person commits an offence if:

- (a) he intentionally penetrates the vagina or anus of another person with a part of his body or anything else,
- (b) the penetration is sexual, and
- (c) the other person is under 13.

This offence carries a possible life sentence, the Crown Prosecution Service (2012a) recommend a sentence of 5 years, increasing with the severity of the harm caused and other aggravating factors.

Section 7 follows section 3 sexual assault, an offence is committed if:

- (a) he intentionally touches another person,
- (b) the touching is sexual, and

(c) the other person is under 13.

The maximum sentence for offences under section 7 is 14 years.¹⁸

Causing or inciting a child under 13 to engage in sexual activity is an offence under s.8, an offence is committed if:

- (a) he intentionally causes or incites another person (B) to engage in an activity,
- (b) the activity is sexual, and
- (c) B is under 13.

Section 8(1) carries a maximum sentence of 14 years¹⁹ but in less serious cases a summary conviction may be obtained which will carry 6 month maximum term. However this offence can warrant a life sentence if section 8(2) applies. Section 8(2) applies to causing activity which involves:

- (a) penetration of B's anus or vagina,
- (b) penetration of B's mouth with a person's penis,
- (c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or
- (d) penetration of a person's mouth with B's penis.

The Crown Prosecution Service (2012b) places the sexual act at the beginning of sentencing considerations, it is also made clear that the same position should be adopted whether the “offender causes an act to take place or incites an act which does not take place”. As with all the sentencing guidelines, aggravating and mitigating factors may apply.

Sections 5-8 are very similar to sections 1-4, the key difference is that 1-4 require the activity to be without the consent of the victim. This is because the government intended to maximise the protection of children, deeming children under 13 too young to consent and ensuring that “children below that age should not have to endure detailed questioning either about their sexual understanding or about whether they gave consent to sexual activity.”²⁰

Similarly to the Australian legislation, where physical sexual activity has taken place, it is the actual age of the victim which is used to decide if they are a child, not their perceived age; this removes the potential for ambiguity in relation to the exact age of a child or the child being dressed in a manner which may give the impression that they are older than they are. In cases concerning offences which do not involve physical sexual activity, the burden may be placed on the defendant to prove he believed the victim to be older.

A contrasting point between the jurisdictions is the use of sting operations; in the UK the victim cannot be fictional, whereas in Australia the police are able to use sting operations as the law allows police to pose as underage children.

¹⁸ Section 7(2).

¹⁹ Section 8(3).

²⁰ Sexual Offences Bill Debated 11 September 2003 col 102’.

Other Child Sex Offences

A further band of offences apply where the child is over 13, Section 9(1) stipulates that a person over 18 commits an offence if they intentionally touch another person in a sexual manner and that person is under 16 or younger than 13. A common sense reading of this section would postulate that it is open to the accused to argue that they reasonably believed that the victim was older than 16. However, absolute liability would apply in cases where the victim is younger than 13.

The section 9(1) offence may lead to a summary conviction and up to 6 months, or on indictment a maximum sentence of 14 years.²¹ Should section 9(2) apply, an indictment offence will be committed and carry up to the 14 years maximum imprisonment. A section 9(2) offence is committed if:

- (a) penetration of B's anus or vagina with a part of A's body or anything else,
- (b) penetration of B's mouth with A's penis,
- (c) penetration of A's anus or vagina with a part of B's body, or
- (d) penetration of A's mouth with B's penis.

There is no precise guidance as to the length of the prison term; it will be at the discretion of the judge. The Crown Prosecution Service advises that the age and maturity of the offender be considered, as well as the relationship between the parties. This offence is capable of being committed by young people and the age gap between victim and offender may be small, just over two years potentially.

Section 10 is the equivalent of section 8 when the victim is over 13 and carries the same maximum jail terms; 6 months on summary conviction and 14 years on indictment. Section 10(2) is exactly the same as section 8(2), promoting the offence to an indictable offence. The Crown Prosecution Service (2012c) provides similar sentencing guidelines but additionally advise a consideration of the relationship between the parties, and the age of the offender.

Under section 11 it is an offence to engage in sexual activity in the presence of a child, a person commits an offence if they intentionally engage in sexual activity for the purpose of obtaining sexual gratification from the knowledge that a person aged under 16 or 13 is present or is in a place from which they can observe the sexual activity. It must also be shown that the accused knew or believed that the child was aware, or at least intended that they be aware, that the accused was engaging in activity of a sexual nature. The same construction as that applicable to section 9(1) in relation to a reasonable belief of the child's age applies here. This section would apply to a person who engages in sexual activity with a third party while deriving sexual gratification from the knowledge that person under 16 was witnessing the activity and was able to appreciate its sexual nature. It would not therefore, cover a situation where a child, for example, accidentally walks-in on their parents having sex.

A maximum prison sentence of 14 years may be given after conviction on indictment, six months if only a summary conviction.²²

Section 12 is very similar to s.11, the only difference is that section 12 concerns causing the victim to watch acts by third parties or via images.²³

²¹ Section 9(3).

²² Section 11(2).

²³ Section 12(1)(a).

Section 13 only applies to persons under 18; should a person under 18 commit any offence under sections 9-12 their maximum sentence will be five years imprisonment if convicted on indictment.²⁴

Section 14 concerns arranging and facilitating sections 9-13 offences, the offender must intend to so act, or intend or believe another person will do so. Section 14(2) provides defences:

- (a) he arranges or facilitates something that he believes another person will do, but that he does not intend to do or intend another person to do, and
- (b) any offence within subsection (1)(b) would be an offence against a child for whose protection he acts.

Section 14(3) clarifies acting for protection in section 14(2)(b). A person acts for the protection of a child if he acts for the purpose of:

- (a) protecting the child from sexually transmitted infection,
- (b) protecting the physical safety of the child,
- (c) preventing the child from becoming pregnant, or
- (d) promoting the child's emotional well-being by the giving of advice.

Section 14 is designed to prevent agency activities; it criminalises approaching others to procure children for sexual activity. It is not important whether the acts intended actually take place, the offence is merely intending them to and acting to facilitate them. This offence will usually be committed prior to another offence, the Crown Prosecution Service advise a starting position above that of sections 9-13 offences.

Section 15 creates the offence of meeting a child following sexual grooming, a person commits an offence if the accused has met or communicated with the child on two or more previous occasions and goes on to intentionally meet the child either as a result of the accused or the child travelling for the purposes of meeting in any part of the world. It must also be shown that the accused intended during the meeting to engage in conduct with the child that would constitute an offence for the purposes of the section outlined above.

This offence is comparable to the section 14 offence relating to arranging or facilitating a child sex offence and could be described as an inchoate offence. It is important however as it criminalises activity which often precedes the more serious offences. The victim in s.15 must be under 16 and a conviction on indictment can receive a maximum of 10 years imprisonment, 6 months on summary conviction.

Australia

2.1.2 Offences involving child pornography material or child abuse material outside Australia

Section 473.1 defines 'child abuse material' as material that depicts a person, or a representation of a person who is or appears to be, or is implied to be younger than 18 and is or appears to be or is implied to be a victim of torture, cruelty or physical abuse. The material must be shown to provide this depiction in a way that a reasonable person would regard as

²⁴ Section 13(2).

being, in all the circumstances, offensive. This definition carries an objective standard, rendering it irrelevant that the defendant may not have found the images offensive. This definition covers situations where the “child” is a fictitious representation of a person as adopted in sting operations.

Section 473.1 also defines ‘child pornography material’ and covers depictions, descriptions and representations of people aged under 18 engaged in or in the proximity of sexual activity or of sexual organs or breast. In this way, the definition applies to material that depicts, represents or describes a person who is or appears to be under 18 and is engaged in or appears to be engaged in a sexual pose or sexual activity (whether or not in the presence of another person) or in the presence of a person who is or appears to be engaged in a sexual pose or sexual activity. Section 473.1 further applies to material which has as its dominant characteristic, the depiction for sexual purposes of the sexual organ or anal region (or a representation thereof) of a person who is or appears to be under 18 or the breasts (or a representation thereof) of such a person. This latter class of material also applies to description or such organs and breasts. The material, representation or description must be such that a reasonable person would regard it as offensive in all the circumstances. The section therefore applies the same objective standard as above.

A person commits an offence under sections 273.5(1) and/or 273.6(1) if:

- (a) the person:
 - (i) has possession or control of child pornography or child abuse material; or
 - (ii) produces, distributes or obtains child pornography or child abuse material;
or
 - (iii) facilitates the production or distribution of child pornography or child abuse material; and
- (b) the material is child pornography child pornography or child abuse material;
and
- (c) the conduct referred to in paragraph (a) occurs outside Australia.

The maximum penalty is 15 years imprisonment.

Absolute liability attaches to the conduct referred to in sections 273.5(1)(c) and 273.6(1)(c).²⁵ A maximum term of imprisonment of 25 years applies where the conduct involves more than two people and the defendant has been shown to have engaged in conduct in breach of section 273.5 or 273.6 on three or more separate occasions.²⁶ Sections 273.5–7 admit of only limited fault elements²⁷ such that the prosecution need only show that the defendant intended to possess, control, obtain, distribute or facilitate the distribution or production of child abuse of pornography material. There is no requirement that the activity constituting the conduct element of an offence against sections 273.5 or 273.6 be the same on each occasion²⁸ such that a person may be charged with multiple offences under this division arising out of a single course of conduct. The question of whether or not the material was in fact child abuse or pornography material would be a question of fact to be determined by the trier of fact.

To protect against double jeopardy, subsections 273.7(5)–(7) and section 273.8 provide that section 273.5 or 273.6 and section 273.7 are *alternative* offences so that a defendant cannot

²⁵ Sections 272.5(2) and 272.6(2).

²⁶ Section 273.7(1).

²⁷ Section 273.7(2).

²⁸ Section 273.7(4).

be convicted of both either section 273.5 or 6 *and* section 273.7. However, they may be found guilty of section 273.5 or 273.6 if the trier of fact is not convinced that their conduct amounted to the aggravated offence under section 273.7.

Section 273.9(1) makes provision for a *public benefit* defence to conduct which would otherwise be a violation of subsections 273.5–6 but was for, and did not extend beyond what is of public benefit. This concept is a question of fact to be determined objectively without reference to the subjective motivations of the defendant. The *Criminal Code Act 1995 (Cth)*²⁹ limits the scope of conduct capable of being for the public benefit, confining it to conduct necessary for or of assistance in enforcing or monitoring compliance with domestic or foreign law, the administration of justice (whether within or outside Australia) or conducting scientific or medial research. In the case of research, the conduct must be reasonable having regard to the purpose of the research.³⁰

The code also provides a defence for law enforcement or intelligence officers and employees of the government or a foreign country performing duties akin to those of a law enforcement or intelligence officer whether they were acting in the course of their duties and the conduct was reasonable in all the circumstances for performing their duty. This is therefore an objective standard with the applicability of the defence depending on a ruling by the trier of fact.

Finally, the code excludes from criminal liability, those persons involved in the detection of prohibited content and the development of content filtering technology.³¹

2.1.3 Offences relating to use of carriage service for child pornography material or child abuse material

A person is guilty of an offence under sections 474.19(1) and 474.22(1) if:

- (a) the person:
 - (i) accesses child pornography or child abuse material; or
 - (ii) causes child pornography or child abuse material to be transmitted to himself or herself; or
 - (iii) transmits, makes available, publishes, distributes, advertises or promotes child pornography or child abuse material; or
 - (iv) solicits child pornography or child abuse material; and
- (aa) the person does so using a carriage service; and
- (b) the material is child pornography or child abuse material.

The maximum penalty is 15 years imprisonment.

The person must *intend* to access the child pornography or abuse material³² but that it is sufficient that they are reckless as to whether or not the material was child pornography or abuse material.³³

²⁹ Section 273.9(2).

³⁰ Section 273.9(3).

³¹ Section 273.9(5).

³² Sections 474.19(2)(a) and 474.22(2)(a).

³³ Sections 474.19(2)(b) and 474.22(2)(b).

It is also an offence to possess, control, produce, supply or obtain child pornography or child abuse material for use through a carriage service. A person is guilty of an offence under sections 474.20 and 474.23 if:

- (a) the person:
 - (i) has possession or control of child pornography or child abuse material; or
 - (ii) produces, supplies or obtains child pornography or child abuse material;and
- (b) the material is child pornography or child abuse material; and
- (c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the child pornography or child abuse material be used:
 - (i) by that person; or
 - (ii) by another person; in committing an offence against sections 474.19 (using a carriage service for child pornography material) and 474.22 (using a carriage service for child abuse material).

The maximum penalty is 15 years imprisonment.

A person cannot be charged with attempting to possess child pornography or abuse material³⁴ but may be so charged even if the material they possess cannot be transmitted or made available to others³⁵. A person may therefore be guilty of an offence under sections 474.20 or 23 but not under sections 474.19 or 474.22. Sections 474.21 and 474.24 provide the same *public benefit*, law enforcement and content management defences.

A maximum term of imprisonment of 25 years applies where the conduct involves more than two people and the defendant has been shown to have engaged in conduct in breach of sections 474.19 (using a carriage service for child pornography material), 474.20 (possessing etc. child pornography material for use through a carriage service), 474.22 (using a carriage service for child abuse material), and/or 474.23 (possessing etc. child abuse material for use through a carriage service) on three or more separate occasions.³⁶ This section operates in the same manner as the aggravated offence outlined above (see section 273.7).

UK

Protection of Children Act 1978:

The *Protection of Children Act 1978* is designed to prevent the exploitation of children through making indecent photographs and to penalise the distribution of such material.

2.2.2.1 Indecent Photographs

Section 1 concerns indecent photographs or pseudo-photographs; a person commits an offence if he takes, or permits to be taken,³⁷ distributes³⁸ or possesses³⁹ an indecent photograph or pseudo-photograph of a child. Section 1(2) defines distribution as parting with

³⁴ Sections 474.20(3) and 474.23(3).

³⁵ Ibid (2).

³⁶ Section 474.24A.

³⁷ Section 1(1)(a), *Protection of Children Act 1978* (UK).

³⁸ Section 1(1)(b).

³⁹ Section 1(1)(c).

possession, or exposing or offering for acquisition by another person. This definition was clearly formulated to address physical photographs but it is wide enough in covering images on a computer with the wording “exposes or offers it for acquisition”.

A defence is contained within section 1(4); the accused must prove that he either had

- (a) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in possession: or
- (b) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect, them to be indecent.

Section 1A provides an exception to section 1 provided the defendant proves “the photograph or pseudo-photograph was of a child aged 16 or over” and that he and the child were either married⁴⁰ or living together as partners in a family relationship.⁴¹

The photograph or pseudo-photograph may only show the child alone or with the defendant⁴² and the defence only applies to distribution if the distribution is only to the child.⁴³

Section 1B provides an exception for criminal proceedings and investigations; this exception is included in a lot of UK law and enables those involved in investigating a prosecuting without committing crimes themselves.

Section 3 allows the both individuals and corporations to be guilty of offences under the act.

Punishments are contained within section 6, offences may be pursued as summary convictions or on indictment. Section 6(2) sets a maximum prison sentence of ten years and or a fine if convicted on indictment. The prison sentence will be a maximum of six months on summary conviction and or a fine of up to £1,000.

The definition of a photograph has needed to be very wide and develop so as to include digital imagery and advancements in computing.

Section 7 states that throughout the Act the word photograph references to a photograph will also include film, copies of film and photographs comprised into film.⁴⁴

A photograph is defined in s.7(4)

- (a) the negative as well as the positive version; and
- (b) data stored on a computer disc or by other electronic means which is capable of conversion into a photograph.

Section 7(4)(A) adds:

- (a) a tracing or other image, whether made by electronic or other means (of whatever nature)—
 - (i) which is not itself a photograph or pseudo-photograph, but
 - (ii) which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both); and

⁴⁰ Section 1A(1)(a).

⁴¹ Section 1A(1)(b).

⁴² Section 1A(3).

⁴³ Section 1A(5).

⁴⁴ Section 7(2).

- (b) data stored on a computer disc or by other electronic means which is capable of conversion into an image within paragraph (a).

Film if defined as any form of video-recording⁴⁵, which allows the definition to include more modern technologies.

Pseudo-photographs are defined as images which appear to be photographs, however they are produced.⁴⁶ Section 7(8) states a pseudo-photograph will be treated as showing a child if the “impression conveyed... is that the person shown is a child.”⁴⁷ Pseudo-photographs include any copy of the pseudo-photograph and as data stored on a computer disc or any electronic means which is capable of conversion into a pseudo-photograph.⁴⁸

2.2.2.2 Pseudo-Photographs

Commentators such as Akdeniz (2008) have questioned the criminalisation of pseudo-photographs, the argument being that no direct harm is caused to any child(ren) in the making of such material and that it is a restriction on an individual’s freedom. Jarvie (2003: 76) discusses the freedom of individuals on the internet; she defines ‘perfect freedom’ as “being left alone to speak, to write, to watch, to listen to whatever is desired”. Yet ‘perfect freedom’ is not granted in the physical world, Jarvie (2003: 76) observes that “even in democratic liberal societies [freedom] has been circumscribed and qualified by exceptions specifying in what circumstances the state may interfere or infringe this right”. The criminalisation of pseudo-photographs of indecent images of children is a circumscription or qualification of individuals’ freedom on the internet, and as Gillespie surmises, this can be justified in two ways; “[t]he first is that it harms the moral fabric of society; the second is that it can cause harm to real children” (Gillespie 2010: 25).

Brenner identifies the first justification by breaking criminal law into categories based on the harm caused by the offence; hard harms and soft harms. Hard harms are seen as traditional offences, physical harm against another human, be that murder, rape, other bodily harm or theft and damage to property. Soft harms are non-physical wrongs the law has addressed, offences against harming ‘morality’, ‘affectivity’ or causing ‘systemic’ harm. Brenner argues offences against morality include the possession and abuse of substances or obscene images, or breaching gambling legislation; these crimes don’t directly harm another individual but are against the “moral sense of the community.” Evidence of the second justification can be seen in the statistics compiled by the NSPCC, these indicate a third of offenders possessing indecent images of children having also been convicted of physical offences against children.⁴⁹ Studies by Marshall (1988) reported that 53 per cent of a sample of child abusers used child abuse materials in preparing for offending, and Carter et al. (1987) reported that child molesters used child abuse materials prior to and during their offences. By way of contrast, they also reported that pornography was sometimes used to relieve the impulse to commit offences; and existing studies have not shown a causal link but arguably shows a relationship between owning images and directly harming children.

⁴⁵ Section 7(5).

⁴⁶ Section 7(7).

⁴⁷ Section 7(8).

⁴⁸ Section 7(9).

⁴⁹ Based on 284 cases 98 offenders were also convicted of grooming or sexual assault, either in the same case or previously, this equates to 33.451% (NSPCC 2011).

While the definitions of a photograph and a pseudo-photograph have been established, however what constitutes indecent has not been defined. Instead, if in dispute, this is to be a question for the jury, as established in *R v Stamford*,⁵⁰ to determine this based on what is the recognised state of propriety.

Australia

2.1.4 Offences relating to use of carriage service involving sexual activity with person under 16

It is an offence under sections 474.25A(1) and (2) to engage in sexual activity with a child under 16 years of age using a carriage service or cause that child to engage in sexual activity with another person (the participant) where the person engaging in that activity is older than 18. Both offences carry a maximum penalty of 15 years imprisonment.

It must be proved beyond reasonable doubt that the defendant *intended* that their conduct would cause the child to engage in sexual activity with another person.⁵¹ The *Criminal Code Act 1995* (Cth) also provides for a defence where a child was present during the sexual activity but did not engage in that activity and the defendant is shown to have derived no sexual gratification from the child's presence.⁵²

Section 474.25B(1) creates an aggravated form of the offences in sections 474.25A(1) and 474.25A(2) carrying a maximum penalty of 25 years imprisonment in circumstances where the child in question has a mental impairment and/or the defendant was in a position of trust or authority in relation to the child, or the child was otherwise under the care and supervision of the defendant. As with subsections 273.7(5)–(7), sections 474.24A and 474.24B are *alternative offences*. Section 474.28(7A) makes clear that there are no additional fault elements required to make out the aggravated offence here beyond what is required to prove the underlying offence. Furthermore, *absolute liability* attaches to whether or not the child has a mental impairment for the purposes of section 474.25B and strict liability attaches to whether or not the defendant was in a position of trust authority, or charged with the care, supervision or authority of the child.

Section 474.25A has a similar effect to section 272.9(2) (Causing Child to Engage in Sexual Activity in Presence of the Defendant) without the requirement for the child to be located outside Australia.

Absolute liability attaches to the *physical element* of section 474.25A insofar as the child is under 16 years of age⁵³ and to the fact that the participant in subsection (2)(d) is at least 18 years of age,⁵⁴ this renders the defendant guilty of the physical elements of the offence regardless of whether the defendant knew or intended that the relevant child was under 16 or 18 respectively, with no possibility of arguing that they suffered under a mistake as to this fact. This approach is similar to that of the UK, where offences involving physical activity do not allow for any defence relating to the apparent age of the victim; the actual age is used.

⁵⁰ [1972] 2 Q.B. 391

⁵¹ Section 474.25A(3).

⁵² Section 474.25A(4); see also section 474.29.

⁵³ Section 474.28(1)(a).

⁵⁴ Section 474.29(2).

Section 472.26 (Using a carriage service to *procure*⁵⁵ persons under 16 years of age) was introduced into the Code in 2004⁵⁶ creates three separate offences, each carrying a maximum penalty of 15 years imprisonment in cases where the defendant uses a carriage service to transmit a communication to another person with the intention that the recipient will:

- (1)(b) Engage in sexual activity with the defendant; or
- (2)(b) Engage in sexual activity with another person; or
- (3)(b) Engage in sexual activity with another person who is or whom the defendant believes is under 18 years of age.

The defendant must be older than 18 years of age and the recipient in all of these cases must be, or the defendant must believe they are, under 16 years of age. In the case of the offence in subsection (3), the defendant must intend the sexual activity to take place in their presence or in the presence of a third party participant who is older than 18 years of age;⁵⁷ although this intention may be inferred from the nature of the communication/s and the circumstances of the case.⁵⁸ For example, in *Tector v R*⁵⁹ the court explained that while the apparent sexual activity desired by the sender may be low level, their true intention may be to use this as a pretext to meet the child before engaging in more serious sexual activity. This inference can be based on things like the sender's criminal history in relation to sexual misconduct. However, this would presumably run head-on into the issues relating to the admissibility of Tendency Evidence.

Absolute liability (see above) attaches to the *physical element* of this offence insofar as the child is under 16 years of age⁶⁰ and to the fact that the participant in sub-sections (2) and (3) is younger than 18 years of age.⁶¹

The importance of this section is relatively self-explanatory in that it applies to a defendant who seeks to procure a child for sexual activity through a carriage service such as an IRC chat room, social networking site and peer-to-peer (P2P) messaging service. It also applies to a defendant who attempts to orchestrate a sexual encounter between a child and a third party adult participant or between two children in the presence of themselves or a third party adult participant.

This section was applied in *Tector v R*⁶² where the appellant passed a written note to a boy in a chatroom and asked to be added to his contacts list for chat. The boy did this and was asked by the appellant to touch the latter's penis for money. The boy told his mother about this incident and this led ultimately to a sting operation in which the appellant was arrested while talking to the complainant who was not being impersonated by a police officer. The appellant had several prior convictions for sexual misconduct but had not physically interfered with the complainant in this case. In passing sentence, the court considered the nature of the offence created by s 476.26 and the circumstances associated with an offence and the nature of the

⁵⁵ Section 474.28(11) defines 'procure' for the purposes of ss 474.26-7 as including conduct intended to encourage, entice or recruit a person to engage in that activity; or induce the person (whether by threats, promises or otherwise) to engage in that activity.

⁵⁶ Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) (2004).

⁵⁷ Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications and Other Measures) Bill (No. 2) 2004, 45.

⁵⁸ *Tector v R* [2008] NSWCCA 151, [91].

⁵⁹ [2008] NSWCCA 151, [95]-[101].

⁶⁰ Section 474.28(1)(a).

⁶¹ Section 474.29(2).

⁶² [2008] NSWCCA 151.

sexual activity proposed by the applicant. Of particular importance here was the fact that the child was 12 years-old (some 54 years younger than the appellant), the fact that the appellant persistently pursued the child over a 6 week period, and that he went to great lengths to conceal his identity. The court also took note of the fact that the appellant had been convicted under s 474.26(1) on 3 previous occasions. Given these factors, the court found that it was appropriate to use the maximum penalty of 15 years imprisonment under s 474.26(1) as a “yardstick” for determining the appropriate sentence here given the seriousness of the offending. It held that the initial sentence of 11 years with a non-parole period of 7 years was excessive and committed the appellant to be re-sentenced (to a maximum period of 8 years imprisonment on all 3 counts).

Section 474.27 (Using a carriage service to “groom” a person under 16 years of age) creates three offences which largely mirror those in section 474.26 except that the *intention* required of the defendant is that the communication sent to the recipient (child) will make it easier procure the child for sexual activity with the defendant, a third party adult participant or another child in the presence of the defendant or a third party adult participant.

The maximum penalties for these offences are: Subsections 474.27(1) 12 years; (2) 12 years; and (3) 15 years.

Absolute liability attaches to the *physical element* of this offence insofar as the child is under 16 years of age⁶³ and to the fact that the participant in sub-sections (2) and (3) is younger than 18 years of age.⁶⁴

In *R v Costello*⁶⁵ the appellant was convicted under various legislative provisions including s 474.27 after communicating with an undercover police officer posing as a 14 year-old girl. The appellant allegedly transmitted videos of himself masturbating and shaving his genitals. He also asked “her” to view pornographic materials and attempted to seduce “her” by garnering trust and proffering “sexual education”. Although there was no physical meeting, the appellant took down a phone number provided by the “girl” and called “her” that day. His appeal against sentence and conviction was rejected and he was sentenced to 27 months imprisonment by the Queensland Supreme Court.

A person (the *sender*) commits an offence under section 474.27A (Using a carriage service to transmit indecent communication to a person under 16 years of age) if the sender uses a carriage service to transmit a communication to another person (the recipient), the communication includes material that is indecent, the recipient is someone who is, or who the sender believes to be, under 16 years of age; and the sender is at least 18 years of age. The maximum penalty for the offences is 7 years imprisonment.

The ‘indecent’ of the material concerned is a question of fact to be determined by the jury or other trier of fact⁶⁶ but it is determined objectively according to the standards of ‘ordinary people’.⁶⁷

Absolute liability attaches to the *physical element* of this offence insofar as the child is under 16 years of age⁶⁸ and to the fact that the participant in subsections (2) and (3) is younger than 18 years of age.⁶⁹

⁶³ Section 474.28(1)(a).

⁶⁴ Section 474.29(2).

⁶⁵ [2011] QCA 039.

⁶⁶ Section 474.27A(2)

⁶⁷ Section 474.27A(3).

Under sections 474.29(1) and 474.29(2), the defendant may escape liability under section 474.25A if they can discharge the legal burden of proof placed on them to show that at the time of the offence they believed that the child was older than 16 and where charged under section 474.25A(2) that the participant was younger than 18. The same defence is available to offences charged under sections 474.26(2), 474.26 (3), 474.27(2) or 474.27(3) where the defendant believed that participant was younger than 18 and sections 474.26, 474.27 or 474.27A where the defendant believed that the recipient was older than 16⁷⁰. For example, in *Costello*⁷¹ the appellant argued that, based on the nature of the communications between himself and the “girl”, he formed the belief that he was in fact talking to a middle-aged man and so did not believe himself to be talking to a person under 16 years of age. This argument was rejected by the court.

A similar defence exists in relation to charges brought under section 474.25B where the defendant shows that at the time of the offence, they believed that the child was not suffering from a mental impairment.⁷²

In answering this question, the defendant is entitled to rely on representations made to them that the child/recipient was of a particular age⁷³ and that the participant (if relevant) was at least 18 or was of a particular age.⁷⁴ However, this may also be used by the prosecution to show that the fault element for these offence has been made out where there was a representation made to the defendant that the recipient and/or participant were younger than 16 and older than 18 respectively.

Therefore, this defence may absolve the defendant of liability where it is shown that, despite being guilty of the physical element of the offence, they lacked the requisite intention to constitute the mental or fault elements of the offence charged. However, the trier of fact is entitled to consider whether that belief was ‘reasonable in the circumstances’,⁷⁵ suggesting that the standard of proof for these defences is both subjective and objective. The defendant must therefore show that they subjectively held the belief in question relating to the age of the child and that the belief was one which a reasonable person would have held in all of the circumstances.

However, it is no defence to a charge laid under sections 474.26 and 474.27 that it was impossible for the relevant sexual activity to take place⁷⁶ or that (where charges are laid under sections 474.26, 474.27 or 474.27A) that the recipient of the communication is a fictitious person represented to the sender as a real person.⁷⁷ As explained above, provisions of this kind preserve a prosecution procured as a result of a sting operation by law enforcement agencies.

Finally, it is not an offence to attempt to commit an offence against sections 474.26 or 474.27.⁷⁸ However, these sections (ss 474.26-9) were specifically enacted to criminalise the

⁶⁸ Section 474.28(1)(a).

⁶⁹ Section 474.28(2).

⁷⁰ Sections 474.29(4)–(5).

⁷¹ [2011] QCA 039.

⁷² Section 474.29(3).

⁷³ Section 474.28(3).

⁷⁴ Section 474.28(4).

⁷⁵ Section 474.29(6).

⁷⁶ Section 474.28(8).

⁷⁷ Section 474.28(9).

⁷⁸ *Ibid* (10).

practice of child-grooming and its attendant machinations of conduct to make it clear that such conduct is a crime in and of itself and not a mere attempt to commit the more serious offence of sexual misconduct in relation to children.⁷⁹

UK

Sexual Offences Act 2003: Abuse of Children through Prostitution and Pornography

The final set of offences within the Sexual Offences Act which is specific to children is found in sections 47-51. Firstly section 47 is the offence of paying for sexual services of a child. The offence is simple, a person must intentionally obtain the services,⁸⁰ payment must be promised beforehand⁸¹ and the person engaging in the sexual acts must be under 18.⁸²

If the child is under 13 a life sentence may be given, if not the maximum sentence is 14 years.

Section 48 is similar to section 8, the crucial difference being engaging in prostitution or pornography rather than simply sexual acts. The offence applies if the other person is under 18 and carries a maximum sentence of 14 years.

Sections 49 and 50 relate to controlling and facilitating prostitution or pornography. Under section 49 it is an offence to control the acts of a person under 18, and section 50 is the specific offence of arranging for a child to be used as a prostitute or in pornography. Both offences have a maximum prison sentence of 14 years. Any individual engaging in sexual intercourse with a child under 13 may also be convicted of rape.

Rape against a child under 13

Under Section 5(1) A person commits an offence if s/he intentionally penetrates the vagina, anus or mouth of another person with his penis, and the other person is under 13.

Section 5(2) stipulates that a person guilty of an offence under section 5(1) may be imprisoned for life. The UK sentencing council recommend at least 10 years, increasing with the presence of aggravating factors.

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⁷⁹ Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications and Other Measures) Bill (No. 2) 2004.

⁸⁰ Section 47(1)(a).

⁸¹ Section 47(1)(b).

⁸² Section 47(1)(c).

⁸³ Section 47(1)(a).

⁸⁴ Section 47(1)(b).

⁸⁵ Section 47(1)(c).

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Summary

The *Sexual Offences Act 2003* is a detailed act separating offences by their severity and victims. The Act mainly addresses the physical world rather than any online dangers children face. SOA 03 is important in relation to the exploitation of children online; the images produced for sharing online are usually produced in the physical world, as a result children are physically harmed though child sex offences in order for the material to be produced. The key legislation addressing this material is the *Protection of Children Act 1978*.

2.3 Conviction statistics: A snapshot

It would be pleasing to cite comprehensive statistics on patterns and trends in online child exploitation, particularly on the offender profile, but this remains an elusive goal as such activities are generally unreported and undetected. Reviewing official statistical data on reported offences, arrests and convictions is often a useful starting point as it provides a measure of governments' efforts and yield detailed information about known offenders and conduct. Once the scale of online child sexual exploitation activities is known, the impact of crime prevention, effectiveness of existing policy and legislative responses can be evaluated. The evaluation and study of policy and legislative implementation is important, as a badly implemented policy may not result in any of the hoped-for benefits eventuating (regardless how well-conceived the policy may be). Findings will improve knowledge of the nature and dimensions to the problem, and of suitable risk management and mitigation strategies. This would facilitate the development of evidence-based 'forward looking' strategies.

Of the 279 commonwealth child pornography offences brought before the court in Australia for the period 1 July 2010 to 30 June 2011, there were 114 convictions of child pornography offences and 97 of them were sentenced to imprisonment (Australian Bureau of Statistics 2012). The number of summary charges (11) and indictable charges for child pornography offences reported by Commonwealth Director of Public Prosecutions (2013) for the period 1 July 2011 to 30 June 2012 were 12 and 693 respectively.

The National Society for the Prevention of Cruelty to Children identified 284 cases in six months between April and September 2010. Note that these were only reported cases, and the total number cases is likely to be higher. In 2009 there were 1,246 convictions for taking, making and/or possessing indecent images (NSPCC 2011). Importantly the NSPCC found that in 98 of the 284 cases the offender was also convicted of "grooming children or had committed sexual assaults on children either previously, or during the same case." Of those offenders 280 were male, only 4 females and offenders ages ranged from 18 to 76. The number of pictures and films in the 284 cases was 2,992,014, nearly 3 million, on average each offender possessed over 10,500 images per case. This could be indicative of two important issues; firstly that cases are only pursued if there are a sufficient number of images and secondly that the development of computing and data storage allows offenders to amass large collections of material.

35,000 images were categorised as level 4 and 5 images. The Sentencing Guidelines Council define level 4 as “penetrative sexual activity involving a child or children, or both children and adults,” and level 5 as “sadism or involving the penetration of, or by, an animal” (Crown prosecution Service n/d). This is a large number of images but only just over 1% of the images (i.e. 35,000 equates to 1.170% of 2,992,014) so the vast majority of the images were of a less serious nature.

The convictions statistics from 2005 to 2010 from the Ministry of Justice is shown in Table 1, and the statistics do not include cautions – according to the Ministry of Justice, Home Office & the Office for National Statistics (2013: 28), the numbers of cautions for sexual activity with child under 13 increases from 67 to 100 between 2010 and 2011.

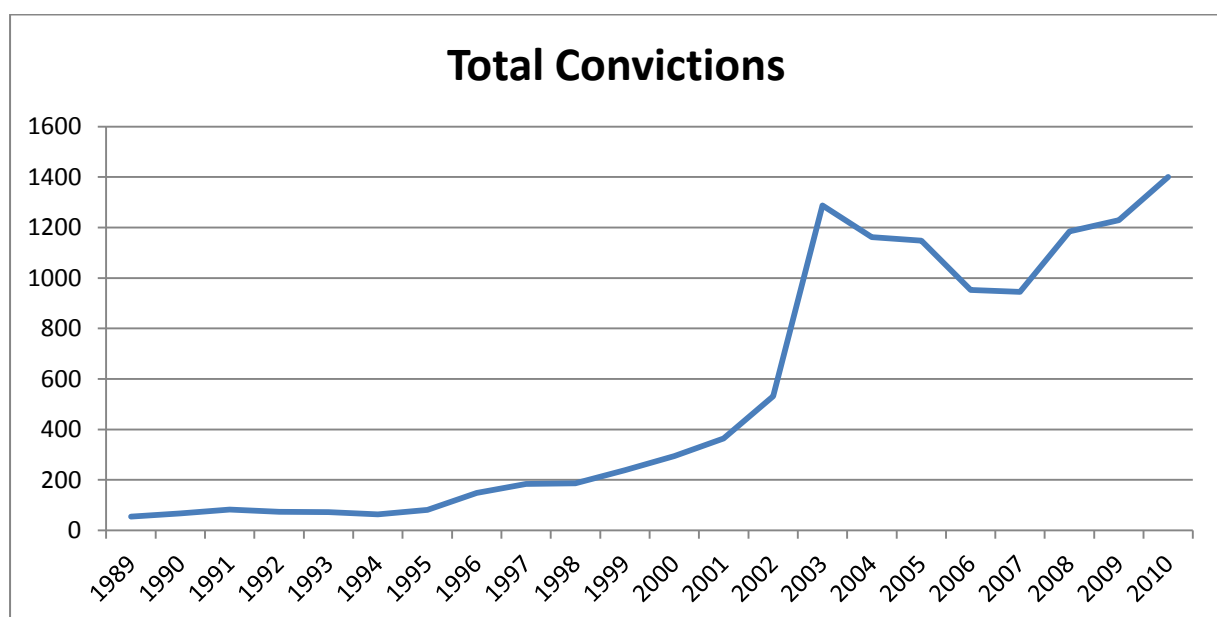
Table 1: Offenders sentenced at all courts in England and Wales for possessing, taking or distributing indecent photographs of a child from 2005 to 2010

Year	Possessing indecent photograph of a child	Take, permit to take or distribute indecent photograph of a child
2005	227	921
2006	184	768
2007	192	753
2008	261	924
2009	235	994
2010	189	1212

Source: Ministry of Justice (n/d)

The numbers clearly show a rise in child pornography convictions during the 1990s and an even sharper rise from 2002; from here the numbers drop until 2008 when they begin to rise again. 2010 sees a record high in convictions – see Figure 1.

Figure 1: Total Convictions for Possessing, Taking, Permitting to Take or Distributing Indecent Images of a Child



Source: Compiled from Ministry of Justice (n/d) and Akdeniz (2008, p.21)

The Ministry of Justice, Home Office & the Office for National Statistics (2013) also reported that the conviction ratios for “meeting a child under 16 following sexual grooming” and “gross indecency with a child” offences were “greater than 100, specifically 103.7 and 295.2 for these offence types in 2011 ... [and] is likely to be because the offender was initially proceeded against at the magistrates’ court for a different sexual offence” (Ministry of Justice, Home Office & the Office for National Statistics 2013 : 35). However, the average custodial sentence length for offenders sentenced for Sexual Activity with Minors is only between 22 and 36 months.

3. Discussion

The threat of online child exploitation has given rise to a demand for strategies for prevention and control. In recent years, international treaties such as the Council of Europe (CoE) convention on the protection of children against sexual exploitation have been introduced to deal with child sex offences. Common law jurisdictions such as Australia, Canada, Singapore, US and UK have also introduced online child exploitation offences such as child pornography and online child grooming offences and laws that regulate the behaviour of sexual offenders on release from custody, such as sex offender registration and community notification. Several common law jurisdictions have also introduced extraterritorial legislation that makes it a criminal offence for their citizen to travel outside the respective jurisdiction with the intent of engaging in sexual activity with a minor (e.g. Part IIIA of the Crimes Act 1914 (Cth) as amended by Crimes (Child Sex Tourism) Amendment Act 1994 (Cth) in Australia; and the PROTECT Act of 2003 in US); far less attention has been given to this issue in other jurisdictions (especially less developed jurisdictions where values are different and life may not be as highly valued). For example, in the third Organization for Security and Co-operation in Europe (OSCE) Supplementary Human Dimension Meeting for 2007, Ernie Allen – the Director of International Centre for Missing and Exploited Children – noted that only 49 of the 186 Interpol member countries and 33 of the 56 OSCE participating states have banned the possession of child abuse materials (OSCE 2008).

The use of online child sexual exploitation legislation often seeks to proscribe transnational criminal activity. Recent legislation deals with this by enabling prosecutions to take place where the accused or victim are located in different jurisdictions as long as there remains a sufficient connection with the place in which the prosecution is commenced. Where an accused is located in another country, however, it may be necessary to seek extradition. Australia, for example, may request the extradition from other countries of persons who have committed acts online that adversely affect Australian citizens or interests for them to be returned to Australia to face prosecution (as governed by the *Extradition Act 1988* (Cth)). As noted by Grabosky (2007), the *nullum crimen sine lege* principle is relevant in most legal systems. Satisfying the criterion of dual criminality – the alleged misconduct must constitute an offence under both the laws of the extradition country and the requesting country – is invariably necessary in both extradition and mutual assistance requests. The United Kingdom (UK) is, perhaps, one of few jurisdictions to have abolished the criterion of dual criminality for sexual offences involving children tried under extraterritorial jurisdiction. Section 72(1) of the *Criminal Justice and Immigration Act 2008* (UK) states that if a UK national does an

act in a country outside UK, and the act, if done in England and Wales or Northern Ireland, would constitute a sexual offence to which this section applies, the UK national is guilty in that part of UK of that sexual offence.

The concept of ‘dual criminality’ has been a procedural backbone of many, if not most, existing treaties on mutual legal assistance, but can also preclude more cooperative relationships in the investigation and prosecution of criminal matters. The use of the principle varies from one State to another, with some requiring dual criminality for all requests for assistance, some for compulsory measures only, some having discretion to refuse assistance on that basis, and some with neither a requirement or discretion to refuse (Dandurand, Colombo & Passas 2007: 268).

Baines 2008 and Kierkegaard (2008) independently pointed out that online child sexual exploitation is not criminalised in many jurisdictions including EU member jurisdictions. The lack of legislation in various jurisdictions could potentially ‘hinder efforts to hold perpetrators to account, ... efforts to regulate the Internet at both national and international levels, and to access data for investigative purposes’ (Baines 2008: 10) and affect the ‘day-to-day cooperation between law enforcement in different countries ... since criminal procedural rules are national and there are huge differences between different countries’ (Allen & Overy LLP 2008: 62). In addition, timely access to evidence is often required in investigating online child exploitation cases. Evidence may be located in one or more overseas jurisdictions and may be difficult or impossible to obtain without the timely assistance of authorities in these overseas jurisdictions. The challenges/difficulties in obtaining timely cooperation is compounded when the suspect is located in a jurisdiction with no online child sexual exploitation offences, and non-consistency in criminal procedures and laws in different jurisdictions can also impose serious operational burdens on the resources of a jurisdiction’s prosecution services. South Australia’s former Director of Public Prosecutions explained that the cross-border nature of cyber crime including online child sexual exploitation offences ‘allow[s] for the potential of deliberate exploitation of sovereignty issues and cross-jurisdictional differences by criminals and organised crime. Successfully tracking the digital trail requires quick and co-ordinated action between agencies and across borders but the costs of such investigations and prosecutions are high’ (Pallaras 2011: 80).

Thomas (2009:15) explained that ‘harmonization ... [ensures] transnational cooperation in a correct assessment of a cyber threat, in the resolution of the cyber threat, and in the punishment of those responsible for launching the threat’. The importance of international cooperation in cyber crime cases is also emphasised in the report of the Australian Government Joint Standing Committee on Treaties’ “Review into Treaties” report tabled in Parliament on 11 May 2011.

The Attorney-General’s Department cited a recent successful operation against child sex abuse to illustrate the effectiveness of international co-operation against this and other areas of cybercrime, such as fraud and terrorism.¹¹ The Department’s representative Mr Geoff McDonald advised: Operation Rescue, led to the arrest of nearly 200 suspected paedophiles and rescued 230 children. Operation Rescue commenced as an investigation undertaken by the AFP alone. It then spread to a

British investigation. In response, the Federal Police and British police formed a joint investigation, which involved sharing intelligence with police in Thailand and the subsequent discovery of a website publishing child abuse material. It then led to other countries: the Netherlands, the involvement of Europol, Canada, Italy, the United States, New Zealand. People were arrested in Chile, Brazil and France (Australian Government Joint Standing Committee 2011: 81).

Countries such as Australia and United Kingdom have a relatively comprehensive legislative framework in place to deal with online child sexual exploitation but, until the process of harmonisation of laws and sanctions is more advanced, disparities within and between countries will continue to create risks. It should also be noted that ‘legislation can differ even amongst the nations in which VGT member agencies operate’ (Baines 2008: 2).

Existing legislative and prosecution-based approaches, while important, are unlikely to be adequate.

Potential Research Topic 1. What legislative reforms are needed to respond to emerging challenges? For example, confiscation of criminal and corruption proceeds, and more recently the introduction of “unexplained wealth provisions” in Australia, has been a key strategy for disrupting serious and organised criminal activity (see Bartels 2010; Choo 2008). Such measures are consistent with the “Follow the money” approach undertaken by law enforcement and regulatory agencies in investigating money laundering, terrorism financing and other predicate offences such as tax evasion matters. Would it be feasible or effective to extend similar criminal asset confiscation regimes, particularly the “unexplained wealth provisions”, to commercial sexual exploitation of children cases?

4. What are our alternatives?

4.1 Bridging the ICT gaps

ICT should not be blamed for any increase in online child exploitation, as this is simply evolution. For example, prior research into the causal relationship between possession and use of online child exploitation (including actual sexual contact offending) has largely been conducted prior to the widespread adoption and use of ICT, in the pre-Internet age. As Taylor and Quayle (2004) have observed, much of the research into the use of child pornography pre-dates the internet, which has made child pornography freely available. This gap in research concerning the impact of the Internet is important because of the special characteristics of cyber crime. Governments, particularly those in law enforcement and policy making, may be hindered by the lack of recent understanding of the complexity of these criminal elements in using technologies to sexually exploit children for commercial benefits that results from domestic and international demand (these include using the internet and other online services to locate or advertise child-sex tourism operators and services, to make direct contact with child prostitutes and to mail order children over the internet (e.g. from Asia to U.S.) – see Choo (2009) and Jyrkinen (2005)) – a view shared by Latonero, Berhane, Hernandez, Mohebi and Movius (2011).

Different players in the global and digital economy are best placed to play different but complementing roles in mitigating the online child exploitation risks. For example, the United Kingdom government is attempting to exert pressure on internet service providers (ISPs) to tackle indecent images on the internet, British Culture Secretary, The Rt Hon Maria Miller MP, has been asking for increased efforts from ISPs (Miller 2013). ISPs agreed to start seeing illegal images themselves rather than only responding to complaints, this is promising UK government continues to pressure IPSs, most recently the Prime Minister called for ISPs to block such images or face legislation (Cameron 2013), yet it is difficult to envisage what from such laws would take.

From a law enforcement perspective, cyber crime (including online child exploitation) investigation ‘is much more than just the low-level technology examination and requires the involvement of a wide range of investigative skills and practices that in turn are already underpinned by established professional disciplines such as criminology, psychology, social science, forensic science, and legal practice’ (Hunton 2010: 386). We need to bridge the gap between governments, academia, industry, and the community, and between the science and social science disciplines; in order to contribute to the strategic, operational and policy vacuum and ensure that developments in technologies are well understood and understand the scale of online child exploitation activities.

Potential Research Topic 2. Understanding how different technologies are, and can be, used by criminals in the online exploitation of children (including online commercial sexual of children), and whether this present any trends; and the characteristics of offenders and offending.

Potential Research Topic 3. Designing technologies that will enhance the capability of law enforcement agencies in detecting online child exploitation activities in real-time (i.e. enhancing guardianship in the Routine Activity Theory)? For example, sharing video materials is a popular way of sharing digital content on the Internet and approximately 100 hours of videos are uploaded to YouTube every minute (YouTube 2013). How do we enhance existing systems such as PhotoDNA (Microsoft n/y) and

Artemis Triage Child Pornography Tool (Oak Ridge National Laboratory n/y) so that we are able to detect child-abuse video materials more efficiently on-the-fly?

Potential Research Topic 4. What data sharing mechanisms currently exist between government agencies, private sectors, not-for-profit organisations and academia for the collection and use of data on online exploitation of children? For example, what data sharing mechanisms should be used for online exploitation of children, and what sharing and protection of information processes should be used to facilitate research in this area?

4.2 Focusing on prevention and education

Online child sexual exploitation is particularly serious and often results in devastating consequences for the young victims involved. A recent study funded by the Australian Government Criminology Research Council, for example, found that ‘a sample of 2,759 CSA [childhood sexual abuse] victims who were abused between 1964 and 1995, it was found CSA victims were almost five times more likely than the general population to be charged with any offence than their non-abused counterparts, with strongest associations found for sexual and violent offences’ (Ogloff, Cutajar, Mann and Mullen 2012: 1).

A focus on prevention and education is likely to go further towards protecting children from such behaviour, either perpetrated by the offenders or the victims (e.g. sexting and in cases where victims were ‘directed’ by the offender to perform sexual acts on themselves in front of a webcam). For example whilst sexting is a serious issue, is it appropriate to prosecute these matters as possession of child pornography? A study by Wolak, Finkelhor and Mitchell (2012: 1) found that “US law enforcement agencies handled an estimated 3477 cases of youth-produced sexual images during 2008 and 2009 ... Two-thirds of the cases involved an “aggravating” circumstance beyond the creation and/or dissemination of a sexual image. In these aggravated cases, either an adult was involved (36% of cases) or a minor engaged in malicious, non-consensual, or abusive behavior (31% of cases)’. The responses from the 675 investigators in the US law enforcement agencies suggested that “varied cases and restrained responses by law enforcement [as m]ost youth were not arrested and, of the few youth who were subject to sex offender registration laws, most had committed additional sex crimes, such as sexual assault” (Wolak, Finkelhor and Mitchell 2012: 9–10).

Potential Research Topic 5. Would it be better served to accept that this type of behaviour is a natural process of teenagers coping with changing emotional responses and that they now have access to different technologies that previously dissuaded this type of behaviour?

Perhaps the instances of children sexting should be dealt with as issues requiring counselling from a qualified person such as a psychologist, rather than being treated as a criminal offence, with the serious tag associated with child exploitation offences? For example, can we divert such incidents from the prosecutorial process to court supervised counselling as long as no other serious offences are alleged (e.g. coercion and sexual assault) and the children involved in this would be counselled and warned about the ramifications of the behaviour? Those involved would be required to undertake supervised counselling and be placed under a court issued bond agreement for a period of time, and required to surrender any hardware storing the materials or any other copies of this material, on the understanding that

- The offence is a serious matter;
- Any further offending will result in prosecution; and

- The diversion may be cited in any future criminal proceedings (of a similar nature such as online child grooming and other sexual offences).

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