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Assembly

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# Online Risks and Children

## Key Points

- In Northern Ireland, recent research<sup>1</sup> showed that 75 per cent of households had access to the internet. It is anticipated that by 2021 this will have reached near saturation coverage. In 2014, it was reported that 65 per cent of children aged between 12 and 15 years old in the United Kingdom (UK) own a smartphone.
- The House of Lords Communications Committee, in a report on 'Social Media and Criminal Offences', suggested there are two ways to consider online acts: 'either they are new acts, or they are acts already prohibited by the criminal law but committed in the new forum of social media'.<sup>2</sup> The Committee also noted that, in response to a high volume of offences, 'society has four options: i) do nothing and accept the status quo; ii) add resources so that more allegations can be investigated and prosecuted; iii) change the law so that behaviour is no longer criminal; iv) retain the law and approach to prosecutions, but seek to change behaviour through policy interventions'.<sup>3</sup>

<sup>1</sup> 2012/13.

<sup>2</sup> House of Lords Communications Committee (2014) *Communications Committee - First Report Social media and criminal offences*. Available from: <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3702.htm> para.12.

<sup>3</sup> As cited above para 78

- The definition of 'sexting' is the subject of debate. Academics have noted that the range of behaviours encapsulated by this term makes it difficult to distinguish one type of sexting act from another, to identify the resulting harm from a particular act, and so to determine the appropriate legal response, if required. For children involved in UK-based studies,<sup>4</sup> the practice is neither shocking nor surprising. While not all are engaging in this behaviour, they are aware of peers who are.
- It has been suggested that because of children's immaturity and lack of future-orientated thinking, they are less likely to fully understand and consider the consequences associated with sharing intimate images online. Risks associated with this activity include: loss of control of the image; blackmail; bullying; emotional distress; unwanted attention; 'revenge porn', and 'trophy syndrome'<sup>5</sup>.
- Strict application of child pornography laws can result in children being charged with creating, possessing and disseminating child pornography. In Northern Ireland, the Public Prosecution Service will consider if the public interest requires prosecution. Between 1 March 2013 and 31 March 2015, of the 75 prosecution decisions relating to children in cases of indecent images of children and other image offences, one was for prosecution, 8 were for non-court diversions 66 were decisions of no prosecution.
- Legislative responses to address these behaviours in other jurisdictions include de-criminalisation of consensual activity, providing lesser penalties for children and putting in law the requirement for internet safety education programmes.
- Predatory adults masquerading as children online pose a number of risks for children. Children may be deceived into producing intimate images of themselves or engaging in online sexual activity. Children may also be groomed online. Some children have been abducted, killed or trafficked for sex.
- It is likely that the prevalence of predatory adults masquerading as children online is underestimated as the children involved are reluctant to report abuse out of fear or shame or the abuse continues undetected by authorities.
- It has been observed that in the virtual world, the need for cautiousness by children is often forgotten. It has been noted that the warning signs traditionally associated with strangers can be lost amongst the possibility and excitement of new relationships.

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<sup>4</sup> Ringrose, J. et al. (2012) *A qualitative study of children, young people and 'sexting': a report prepared for the NSPCC*. [Online] National Society for the Prevention of Cruelty to Children. Available from:

<http://www.nspcc.org.uk/globalassets/documents/research> (Accessed: 4 December 2015), Phippen, A. (2012) *Sexting: An Exploration of Practices, Attitudes and Influences*. Available from: <https://www.nspcc.org.uk/globalassets/documents/research-reports/sexting-exploration-practices-attitudes-influences-report-2012.pdf> (Accessed: 11 November 2015).

<sup>5</sup> Where the recipient shows the image to friends to prove possession.

- An example of legislation specifically enacted to ban predatory adults masquerading as children online could not be identified anywhere in the world within the timeframe for this research.

## Introduction

Following the Justice in a Digital Age Conference in October 2015 the Committee for Justice (the Committee) requested that RaISe examine international research, law and best practice in relation to:

- (i) Decriminalising the act of a child<sup>6</sup> sharing intimate photographs of themselves, if consensual (see pages 4 – 11 of this paper)
- (ii) The creation of an offence of masquerading as a child online. (pages 11 – 15)

### ***Children's access to the internet***

The most recent statistics<sup>7</sup> show that 75 per cent of households in Northern Ireland had access to the internet. The level of internet access has grown steadily over time and it is anticipated that by 2021 internet access in Northern Ireland will have reached near saturation coverage. In addition to PCs and laptops, children are gaining access to the internet through many other platforms such as smartphones, games consoles, tablets and smart TVs. Research studies in the United Kingdom (UK) suggest that the majority of young people aged 9-19 years access the internet at least once a day.

In 2014 Ofcom reported:<sup>8</sup>

- 65% of children aged between 12 and 15 years old own a smartphone.
- One in ten children aged 8-11 (8%) who go online, and two in ten children aged 12-15 (18%) say they have seen something online in the past year that was 'worrying, nasty or offensive'.<sup>9</sup>
- One in five (22%) parents of 8-11s and 12-15s are concerned about their child sharing inappropriate or personal photos or videos with others through their mobile phone. This matches the level of concern among parents whose child aged 5-15 goes online.<sup>10</sup>

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<sup>6</sup> Refers to persons under 18

<sup>7</sup> 2012/13

<sup>8</sup> Ofcom (2014) Children and Parents: Media Use and Attitudes Report. Available from: [http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-use-attitudes-14/Childrens\\_2014\\_Report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-use-attitudes-14/Childrens_2014_Report.pdf) (Accessed: 11 November 2015). p.154.

<sup>9</sup> As cited above, p.9.

<sup>10</sup> Ofcom did not identify differences in extent of concern by gender within age or by socio-economic group.

## 1 Decriminalising the act of a child sharing intimate photographs of themselves, if consensual

### ***What is proposed?***

On 5 November 2015 the Committee took evidence from Mr Jim Gamble QPM, CEO of the Ineqe Safe and Secure. Mr Gamble proposed that legislation<sup>11</sup> in Northern Ireland should be amended so that a child who takes, makes, shows, distributes or possesses an image of him or herself will not commit a criminal offence. Mr Gamble recommended to the Committee that provision should be made so that a child who takes, makes, shows, distributes or possesses an image of another child with **malicious intent** would commit a criminal offence.

### ***Definitions***

The term 'sexting' is the subject of some debate as it is popularly used to describe a range of behaviours. It was defined by an American court as 'the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs via cellular telephones or over the Internet'<sup>12</sup>. A report prepared for the National Society for the Prevention of Cruelty to Children (NSPCC) in 2012 identified that many children do not use the term and suggested that this indicates 'a gap between adult discourse and children's experiences'.<sup>13</sup>

In 2011, instead of the term sexts, the authors of a study proposed the term 'youth-produced sexual images'. They defined these as 'pictures created by minors (age 17 or younger) that depict minors that are or could be child pornography under applicable criminal statutes'.<sup>14</sup>

### ***Why should current legislation in NI be amended?***

Under current law in Northern Ireland a child who takes a sexualised or intimate photograph and sends it to another child is potentially guilty of two offences. This is also the case in England and Wales. There have been reports in the press in recent years of under 18s being warned by police of prosecution and having their names placed on the sex offender register for sharing 'sexts'<sup>15</sup>.

Another criticism of the legislation is that it creates a paradox whereby a child may have reached the legal age of consent yet cannot take, permit to be taken, distribute,

<sup>11</sup> The Protection of Children (Northern Ireland) Order 1978 as amended by the Sexual Offences (Northern Ireland) Order 2008.

<sup>12</sup> *Miller v Mitchell*, 598 F.3d 139 (3d Cir. 2010).

<sup>13</sup> Ringrose, J. et al. (2012) *A qualitative study of children, young people and 'sexting': a report prepared for the NSPCC*. [Online] National Society for the Prevention of Cruelty to Children. Available from:

<http://www.nspcc.org.uk/globalassets/documents/research-reports/qualitative-study-children-young-people-sexting-report.pdf> (Accessed: 9 November 2015). p. 6.

<sup>14</sup> Wolak, J. and Finkelhor, D. (2011) *Sexting: a typology* Available from:

[http://www.unh.edu/ccrc/pdf/CV231\\_Sexting%20Typology%20Bulletin\\_4-6-11\\_revised.pdf](http://www.unh.edu/ccrc/pdf/CV231_Sexting%20Typology%20Bulletin_4-6-11_revised.pdf) (Accessed: 10 November 2015).

<sup>15</sup> <http://www.theguardian.com/media/2014/jul/22/teenagers-share-sexts-face-prosecution-police>

show, possess or publish any intimate photograph or pseudo-photograph of his or herself.<sup>16</sup>

It has been argued that sexting is a social and technological phenomenon that has outstripped the law.<sup>17</sup> This is because strict application of child pornography laws (designed to protect children) in different jurisdictions can charge children with creating, possessing and disseminating child pornography.

### **Scope and prevalence**

Due to the private nature of sexting, the prevalence of this behaviour is hard to measure. It is therefore, difficult to establish the scale of this activity amongst children.

One commentator has suggested that the breadth of behaviours included in the definition of 'sexting' makes it difficult 'to distinguish one type of sexting incident from another, to name what sort of harm results (directly or indirectly) from a particular sext, and so to determine what sort of legal response, if any, is appropriate'.<sup>18</sup>

An American study demonstrated that a range of behaviours can fall within the umbrella term of 'sexting'.<sup>19</sup> It can range from experimental behaviour where children may share an intimate image to initiate a romantic relationship or may be aggravated where an act is reckless or where an adult is involved. This makes the problem hard to define and difficult to address.

### **Children who share images online**

A report written for the NSPCC in 2012<sup>20</sup> noted that there is limited research examining how children experience sexting behaviours. It suggested that problems posed by the sharing of intimate images come from a child's peers.<sup>21</sup> It highlighted that:

*'few teenagers wish to be excluded from the sexual banter, gossip, discussion or, indeed, from the flirtatious and dating activity endemic in youth culture. But to take part is to be under pressure – to look right, perform, compete, judge and be judged.'*<sup>22</sup>

<sup>16</sup> Gillespie, A. (2013) Adolescents, Sexting and Human Rights. *Human rights law review*. 13(4). p. 623-643.

<sup>17</sup> Richards, R. and Calvert, C. (2009) When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case. *Hastings Communications and Entertainment Law Journal*. 32(1). p. 1-40.

<sup>18</sup> Slane, A. (2013) Sexting and the Law in Canada. *Canadian Journal of Human Sexuality*. 22(3). p. 117-122.

<sup>19</sup> Wolak, J. and Finkelhor, D. (2011) Sexting: a typology Available from: [http://www.unh.edu/ccrc/pdf/CV231\\_Sexting%20Typology%20Bulletin\\_4-6-11\\_revised.pdf](http://www.unh.edu/ccrc/pdf/CV231_Sexting%20Typology%20Bulletin_4-6-11_revised.pdf) (Accessed: 10 November 2015).

<sup>20</sup> Ringrose, J. et al. (2012) *A qualitative study of children, young people and 'sexting': a report prepared for the NSPCC*.

[Online] National Society for the Prevention of Cruelty to Children. Available from:

<http://www.nspcc.org.uk/globalassets/documents/research-reports/qualitative-study-children-young-people-sexting-report.pdf> (Accessed: 9 November 2015). p. 6.

<sup>21</sup> As cited above.

<sup>22</sup> As cited above, p. 7.

The EU Kids Online project<sup>23</sup> found that 12% of 11 to 16 year olds in the UK have seen or received sexual messages online, with 2% receiving them more than once a week.<sup>24</sup>

The Internet Watch Foundation (IWF) conducted a quantitative study of youth produced sexual content online<sup>25</sup> between September and November 2014.<sup>26</sup> The key findings of the study are:<sup>27</sup>

- 8% of the images and videos assessed depicted children assessed as 10 years old or younger.
- 18% of content depicted children aged 15 years or younger.
- 85.9% of content showing children aged 15 years or younger was created using a webcam.
- 93% of content in this age group featured girls.
- 47% of content showing children of this age group was classed as Category A or B<sup>28</sup> compared to 27.6% of content in the 16-20 years age range.
- 90% of the total images and videos assessed as part of the study had been harvested from the original upload location and were being redistributed on third party websites (meaning that control over its removal or further distribution is lost).<sup>29</sup>

### ***Psychological Perspective: why children share images online***

It has been suggested that because children lack psychosocial maturity and future-orientated thinking, they are less likely to fully understand and consider the consequences associated with sharing self-generated intimate images online.

Adolescence is a period characterised by the ‘psychological upheaval of puberty’.<sup>30</sup> Major structural changes in the brain occur until the age of 25. Immaturity is associated ‘with an underdeveloped capacity for impulse control, judgment, decision making, planning and the integration of emotions and thinking’.<sup>31</sup> Sexting is identified as being consistent with immaturity and commented that it is ‘an emotionally driven behaviour

<sup>23</sup> This project conducted home interviews with a nationally representative sample of UK children.

<sup>24</sup> Livingstone, S. et al. (2010) *Risks and Safety for Children on the Internet: the UK report*. Available from: [http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20\(2009-11\)/National%20reports/UKReport.pdf](http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20(2009-11)/National%20reports/UKReport.pdf) (Accessed: 11 November 2015).

<sup>25</sup> ‘Youth-produced sexual content’ is defined as ‘Nude or semi-nude images or videos produced by a young person of themselves engaging in erotic or sexual activity and intentionally shared by any electronic means’.

<sup>26</sup> During the course of the study, 3,803 images and videos were found to meet the research criteria. Researchers extended the age categories to include people aged up to 20 years old because of the challenges they experienced in verifying the ages of people featured.

<sup>27</sup> Internet Watch Foundation (2015) *Emerging Patterns and Trends Report #1: Youth-Produced Sexual Content*. Available from: <https://www.iwf.org.uk/assets/media/resources/Emerging%20Patterns%20and%20Trends%20Report%201%20-%20Youth-Produced%20Sexual%20Content.pdf> (Accessed: 30 November 2015).

<sup>28</sup> In line with the Sentencing Council’s Sexual Offences Definitive Guideline which identifies A is the highest category and C is the lowest.

<sup>29</sup> Internet Watch Foundation (2015) *Emerging Patterns and Trends Report #1: Youth-Produced Sexual Content*. Available from: <https://www.iwf.org.uk/assets/media/resources/Emerging%20Patterns%20and%20Trends%20Report%201%20-%20Youth-Produced%20Sexual%20Content.pdf> (Accessed: 30 November 2015).

<sup>30</sup> Judge, A. (2012) ‘Sexting’ Among U.S. Adolescents: Psychological and Legal Perspectives. *Harvard Review of Psychiatry*. 20(2).

<sup>31</sup> As cited above.

that is often impulsive and without a clear anticipation or understanding of the potential adverse consequences'.<sup>32</sup>

### ***Potential risks for children involved in sharing self-generated intimate images***

Commentators have noted that 'the potential for digital images to exist in perpetuity, as well as the psychological effects of widespread distribution of such images, does present the potential for uniquely pernicious harm'.<sup>33</sup> Potential risks for children who engage in this behaviour include:<sup>34</sup>

- Loss of control of the image.
- Retaliation if a relationship comes to an end resulting in 'revenge porn'.
- Trophy syndrome. The recipient may share it with friends to prove possession.
- Blackmail or 'sextortion' where an offender may threaten to share the pictures with the child's family and friends unless the child sends money or more images.
- Bullying if the image is shared with a child's peers or at school.
- Unwanted attention from sex offenders, who know how to search for, collect and modify images.
- Emotional distress, as a child may feel embarrassed and humiliated. These feelings may lead to self-harming.

### ***Current legislation in Northern Ireland***

Northern Ireland has legislation in place making it an offence to take, permit to be taken, distribute, show, possess or publish any indecent photograph or pseudo-photograph of a child.<sup>35</sup> The term 'indecent' is a common law term and is not defined in statute. Under this legislation a child is defined as a person under the age of 18.<sup>36</sup> The maximum penalty for this offence is ten years' imprisonment, a fine, or both.

Accordingly, a child who takes a sexualised photograph and sends it to another child is potentially guilty of two offences.

As stated above, this legislation has been criticized because it creates a paradox whereby a child may have reached the legal age of consent yet cannot take, permit to

<sup>32</sup> As cited above.

<sup>33</sup> Judge, A. (2012) 'Sexting' Among U.S. Adolescents: Psychological and Legal Perspectives. *Harvard Review of Psychiatry*. 20(2).

<sup>34</sup> NSPCC (2015) *Sexting: advice for parents*. Available from: <https://www.nspcc.org.uk/preventing-abuse/keeping-children-safe/sexting/> (Accessed: 8 December 2015).

<sup>35</sup> Protection of Children (Northern Ireland) Order 1978, Section 3. Available from: <http://www.legislation.gov.uk/nisi/1978/1047> (Accessed: 9 November 2015).

<sup>36</sup> As cited above, section 3B.

The legislation also provides for a statutory defence where the defendant can prove that the photograph was of a child aged 16 or over, and at the time of the offence, the child and he or she were either married or civil partners of each other or, lived together as partners in 'an enduring family relationship'..

be taken, distribute, show, possess or publish any intimate photograph or pseudo-photograph of his or herself.<sup>37</sup>

It must be noted however that the Police Service of Northern Ireland (PSNI) and the Safeguarding Board for Northern Ireland, in their guide to sexting and the law, advise that, while offences may technically have been committed by a child engaged in sexting, the matter will be dealt with 'sensitively and considering all of the circumstances'.<sup>38</sup>

### **Public Interest Test**

The Public Prosecution Service (PPS) when looking at a potential case will consider as part of the prosecution test, if the public interest requires prosecution. The PPS's Code for Prosecutors recognises that 'there are circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, prosecution is not required in the public interest'.<sup>39</sup> Factors the prosecutor might consider against prosecuting include 'where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgement or a genuine mistake' and 'where the offence is not of a serious nature and is unlikely to be repeated'.<sup>40</sup>

Information supplied by the PPS shows that between 1 March 2013 and 31 March 2015 the PPS received 48 files relating to 79 suspects below the age of 18 in cases of indecent images of children and other indecent image offences<sup>41</sup>. These figures relate to instances of intimate images being shared either consensually or unsolicited, and instances where the recipient of an intimate image shared it with another child.

The PPS stated that 'of the 75 prosecution decisions made to 31 March 2015, one was for prosecution, 8 were for non-court diversions such as youth conferences or cautions and 66 were decisions of no prosecution, either on an evidential basis or made in the public interest'.<sup>42</sup>

### **Prosecutions in England and Wales**

In 2015, it was reported that a 14 year old boy in the North of England sent an intimate image via Snapchat to a girl of the same age in his class. She shared it with others. Despite not being arrested or charged with an offence, the incident was recorded as a crime of making and distributing an indecent image. The boy's file will remain active for

<sup>37</sup> Gillespie, A. (2013) Adolescents, Sexting and Human Rights. *Human rights law review*. 13(4). p. 623-643.

<sup>38</sup> PSNI and Safeguarding Board for Northern Ireland (2015) *Sexting and the Law*. [Online] Available from: <http://www.safeguardingni.org/sites/default/files/sites/default/files/imce/PD0864%EF%80%A215%20%20Sexting%20%20The%20Law%20Leaflet%20Trifold.pdf> (Accessed: 9 November 2015).

<sup>39</sup> Public Prosecution Service (2008) *Code for Prosecutors* [Online]. Available at: <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Code%20for%20Prosecutors/Code%20for%20Prosecutors%20Revised%202008%20FINAL.pdf> (Accessed: 8 December 2015). p.11.

<sup>40</sup> As cited above, p.13.

<sup>41</sup> Correspondence from the PPS addressed to Alastair Ross MLA, Chair of the Committee for Justice, 3 December 2015.

<sup>42</sup> As cited above.



at least 10 years' and could be brought to the attention of future employers following an enhanced Disclosure and Barring Service check.

The All Party Parliamentary Group for Children (APPGC) reported in 2015 that:

'Forces have said that, if they are to comply with crime recording standards, they have limited options to use out-of-court disposals in such incidents, even if they do not think this is the most appropriate response. This disposal then remains on a young person's record and may be disclosed as part of an enhanced Disclosure and Barring Service check, limiting their future educational and career options.'

## ***Responses in other jurisdictions***

### **De-criminalisation**

#### Australia

In 2013, the Victorian Parliament's Law Reform Committee recommended new laws to deal with the practice of sexting. The Committee's inquiry found sexting behaviours was common among teenagers but many were unaware they were committing serious child pornography offences.<sup>43</sup>

The Crimes Amendment (Sexual Offences and Other Matters) Act 2014<sup>44</sup> created four exceptions to child pornography offences to deal with children who engage in consensual 'sexting'. The exceptions focus on age (by only applying to children under 18) and the nature of the act depicted. In relation to age, the exceptions only apply to sexting by minors. Once a person turns 18, these exceptions will no longer be available. Where images of children are shared, the exceptions are limited to sharing between peers who must not be more than two years older than another child depicted in the image (or reasonably believe this to be so).

#### Canada

In *R v Sharpe*, the Supreme Court of Canada held that sexual images made and kept privately and consensually within legal sexual relationships should not be deemed child pornography.<sup>45</sup> To qualify for this exception, the following conditions must be in place:

- a) The sexual relations themselves must be legal – that is in compliance with the age of consent parameters;

<sup>43</sup> ABC News (2013) *Victoria Parliamentary committee calls for new laws on sexting* 29 May. Available from: <http://www.abc.net.au/news/2013-05-29/committee-recommends-new-laws-on-sexting/4720158> (Accessed: 8 December 2015).

<sup>44</sup> The Crimes Amendment (Sexual Offences and Other Matters) Act 2014, section 8. Available from: [http://www.austlii.edu.au/au/legis/vic/num\\_act/caoaoma201474o2014515/](http://www.austlii.edu.au/au/legis/vic/num_act/caoaoma201474o2014515/) (Accessed: 9 December 2015).

<sup>45</sup> Slane, A. (2013) Sexting and the Law in Canada. *Canadian Journal of Human Sexuality*. 22(3). p. 117-122.

- b) the photography must be consensual, and taken by the partners themselves; and,
- c) the resulting images must only be kept and viewed by the partners, and no one else.

If any one of these conditions is violated, then the image is considered to be child pornography.

While these conditions were set out by the Court before it was accepted that children were sexting, the spirit of the exception is suggested, by academics, to permit children to send intimate images to their sexual partners provided the recipient (or the sender) does not forward it to anyone else.<sup>46</sup>

### **Lessen the consequences**

#### United States of America:

As of 2014, 20 states have amended their criminal codes to address sexting amongst children. Those states have done so using a range of approaches (varying by the penalty of the violation, the intention or *mens rea* required and affirmative defences available).<sup>47</sup> One commentator reports that, most commonly, states addressing the sharing of intimate sexual images between children have simply provided a lesser penalty for violation of the statute (such as Oklahoma).<sup>48</sup> Of the 20 states that have amended their criminal code to address children sexting, nine include a misdemeanour (criminal offences that carry a maximum penalty of one year's imprisonment in most states, though punishment may also include payment of a fine, probation, or community service) as the strictest penalty for, among other elements, a first offence free of malicious intent.<sup>49</sup>

In 2011, the Texas Legislature passed Senate Bill 407 into law, which allows individuals younger than 18 years old who are involved in sexting to be charged with a misdemeanour rather than a felony (the most serious type of criminal offence), and does not require them to register as offenders. The Bill further requires the Texas School Safety Center to develop a curriculum on sexting and make it available for school districts dealing with sexting.<sup>50</sup>

In West Virginia a child who has been involved in this behaviour will not be charged with a misdemeanour, instead the State's prosecutors are required to charge him or her with delinquency (which specifically applies to minors).<sup>51</sup>

<sup>46</sup> As cited above.

<sup>47</sup> McEllrath, R. (2014) Keeping up with Technology: why a flexible juvenile sexting statute is needed to prevent overly severe punishment in Washington State. *Washington Law Review*. (89) p. 1009-1034.

<sup>48</sup> As cited above.

<sup>49</sup> As cited above.

<sup>50</sup> Mayers, R. and Desiderio, M. (2013) Not LOL: Legal issues encountered during one High School's response to sexting. *Brigham Young University Education & Law Journal* (1) p.1.

<sup>51</sup> As cited above.

It has been observed that states addressing juvenile sexting will also consider the child's state of mind. Nearly all of the states require criminal intent to some extent. Of those, the state of mind required is either knowingly, intentionally or purposefully.<sup>52</sup> The Hawaii State Penal Code states at section 712-1215.6:

*(1) A minor commits the offense of promoting minor-produced sexual images in the second degree if the minor:*

*(a) Knowingly uses a computer, cell phone, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another person a nude photograph or video of a minor or the minor's self; or*

*(b) Intentionally or knowingly commands, requests, or encourages another minor to use a computer, cell phone, or any other device capable of electronic data transmission or distribution, to transmit to any person a nude photograph or video of a minor or the minor's self.*

### **Non-Legislative Responses**

Much commentary has argued that existing legislation used to deal with children sharing intimate images has been stretched beyond its logical use and, as a result, punishment is not proportionate. It has been suggested that 'sexting' is a social, rather than a criminal issue which can be addressed through education intervention.<sup>53</sup>

In Louisiana, all schools are required by law to teach Internet safety to students from the 3rd Grade onwards (where pupils are between 8 and 10 years old).<sup>54</sup> The Department of Education is required, under the same legislation, to provide Internet safety information to parents. This includes educating pupils about the risks of transmitting personal information.

## **2 Creation of an offence of masquerading as a child online**

### ***What is being proposed?***

At the Justice Committee meeting on 5 November 2015 Mr Gamble proposed the introduction of legislation to deal with predatory adults who masquerade as a child online. Mr Gamble also proposed that that police should be exempted in order to allow for covert ('sting') operations where police officers adopt the identity of a fictional child in order to target and apprehend offenders.

<sup>52</sup> Hawaii State Penal Code §712-1215.6 Promoting minor-produced sexual images in the second degree. Available from: <http://law.justia.com/codes/hawaii/2013/title-37/chapter-712/section-712-1215.6> (Accessed: 11 November 2015).

<sup>53</sup> Richards, R. and Calvert, C. (2009) When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case. *Hastings Communications and Entertainment Law Journal*. 32(1). p. 1-40.

<sup>54</sup> Louisiana State Legislature. RS 17:280. Available from: <http://www.legis.la.gov/legis/law.aspx?d=630999> (Accessed: 8 December 2015).

### ***Why is legislation needed?***

Although grooming is an offence in Northern Ireland, Mr Gamble highlighted some shortcomings with the current legislation:

*The offence of grooming, which involves engaging a child for the purpose of getting them to come to a place to meet you for a sexual encounter, has a number of constituent elements that have to be met. You also have to prove the person's intent at the time, which is very difficult.*<sup>55</sup>

Child protection experts agree that predatory adults masquerading as children online pose a number of dangers for children:

- Children are being deceived into producing intimate images of themselves or engaging in sexual talk or sexual activity via a webcam.<sup>56</sup>
- Children have been groomed for later abuse. Predators use chat rooms, bulletin boards and online communities to befriend the child to gain trust. The child may become desensitised to sexual activities which may become increasingly abusive.
- Some children have been abducted, killed<sup>57</sup> or trafficked for sex. Children's charity Barnardo's Ireland report that a number of separated children have gone missing from State care in recent years. An unknown portion of these were feared to have been trafficked into the Irish sex industry.<sup>58</sup>
- Vigilantes are adults who pose as a child online to entrap offenders. The actions of vigilantes may have unwanted consequences including the exposure of children to danger.

### ***Scope of the problem***

It is hard to determine the number of children affected by this practice. It is likely that the phenomenon is underestimated as the children involved are reluctant to report abuse out of fear or shame or the abuse continues undetected by authorities.

### ***Research evidence***

Research on this issue is limited. There have been calls for further study in this field that will accurately describe the characteristics and prevalence of the problem and gather information on how offenders operate, what makes children vulnerable to online

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<sup>55</sup> <http://data.niassembly.gov.uk/HansardXml/committee-15712.pdf>

<sup>56</sup> CEOP

<sup>57</sup> For example, in 2010, in County Durham, England, a 33 year old man was imprisoned for the rape and murder of a 17 year old girl. The man had posed as a teenager and used internet chatrooms to groom the girl.

<sup>58</sup> [https://www.barnardos.ie/assets/files/publications/free/ADVO\\_child\\_abuse\\_through\\_the\\_internet.pdf](https://www.barnardos.ie/assets/files/publications/free/ADVO_child_abuse_through_the_internet.pdf)

predators, and who online predators are<sup>59</sup>. Consequently current prevalence rates and other data, particularly for the UK, are unreliable or non-existent.

### ***Risks children are exposed to***

Children are encountering various risks online. Recent international research<sup>60</sup> identified the range of risks and compared the risks encountered by children online in 2010 and 2014. It found that children's exposure to online risk is changing in key ways. Compared with 2010, European 11 to 16 year olds are now more likely to be exposed to hate messages (from 13% to 20%), pro-anorexia sites (from 9% to 13%), self-harm sites (from 7% to 11%) and cyberbullying (from 7% to 12%).

It also reported that children are now slightly less likely to make contact online with someone they don't know face to face (from 32% to 29%) and that awareness-raising efforts about 'stranger danger' are possibly proving effective. However, they are slightly more likely to meet an online contact offline (8% to 12%). The report concluded that overall, online risk affects a significant minority, but by no means a majority of young internet users.

### ***Ages of children at risk from online strangers***

In 2012 the UK's Child Exploitation and Online Protection Centre (CEOP) reported that 8 to 11 year olds using social networks did not know 12% of their social networking 'friends' in the real world. This equated to around 11 'friends' per child. These figures increased significantly for 12 to 15 year olds where 25% of 'friends' (72 per child) are only known to them online.

### ***Which children are at risk?***

UK College of Policing Guidance<sup>61</sup> states that any young person regardless of their age, gender, ethnicity and sexuality can be at risk of being sexually exploited. However, it identifies a number of factors that can increase a young person's vulnerability. Australian research has also identified a similar range of factors<sup>62</sup>. Predators may look for children with particular characteristics; for example, children who go missing – especially on regular occasions from home or care, live in a chaotic or dysfunctional family, have a history of abuse or maltreatment, have social or learning difficulties, or have low self-esteem or self-confidence.

### ***How do predators make contact?***

An offender may enter internet chat rooms, gathering information until they can move the conversation with a child to a private chat room or to a mobile phone, and then

<sup>59</sup> LSE (2014) *EU Kids Online*. Available from: <http://lsedesignunit.com/EUKidsOnline/index.html?r=64> (Accessed: 3 December 2015).

<sup>60</sup> EU Kids Online (2014) *EU Kids Online: Final Report*. Available from: <http://lsedesignunit.com/EUKidsOnline/index.html?r=64> (Accessed: 3 December 2015).

<sup>61</sup> <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/child-sexual-exploitation/>

<sup>62</sup> <https://aifs.gov.au/cfca/publications/risk-and-protective-factors-child-abuse-and-neglect>

eventually arrange a meeting in real life. It has been observed that in the virtual world the need for cautiousness by children is often forgotten. It has been noted that the warning signs traditionally associated with strangers can be lost amongst the possibility and excitement of new relationships. In 2013 CEOP reported a shift in the nature of online exploitation of children. Time between the offender's initial contact and offending behaviour had significantly shortened and rapid escalation to threats and intimidation was becoming more common. It also highlighted that perpetrators were taking a 'scatter gun' approach to target a large number of potential victims.<sup>63</sup>

### ***Meeting an online contact alone***

A survey conducted by the ISC2 Foundation's Safe and Secure Online Programme in 2013, questioned 1,162 children aged nine to 11 from 15 schools in London, Kent and Guernsey, and found that half of the 18% who had met an online stranger did so alone.

Children's charity Barnardo's found<sup>64</sup> that in the Republic of Ireland, one in ten children (aged 9 to 16 years) who arranged to meet someone they first met on the internet experienced physical threats and abuse and in all these cases the person who had introduced themselves online as a child turned out to be an adult. The study also found that almost 30% of children had encountered someone online who asked for information such as their photo, phone number or address, representing an increase of 19% on a similar study two years previously.

### ***Responses in other jurisdictions***

An example of legislation specifically enacted to ban predatory adults masquerading as children online could not be identified anywhere in the world within the timeframe for this research.

### ***US: online impersonation***

A number of states in the US have taken steps to address a rise in the number of cases of online impersonation. These have generally involved reputational damage made by adults to other adults. The specific conduct that these laws prohibit varies from state to state, though it usually amounts to a ban on credibly impersonating another living person rather than a fictitious person.

In state of California in the United States, the law provides law enforcement and individual victims with remedies to address unlawful impersonation. Effective from 2011, Penal Code section 528.5<sup>65</sup> provides for criminal punishment and a civil law remedy for impersonating another person on the Internet for purposes of harming, intimidating, threatening, or defrauding another person.

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<sup>63</sup> [http://www.barnardos.org.uk/cse\\_parliamentary\\_inquiry\\_report.pdf](http://www.barnardos.org.uk/cse_parliamentary_inquiry_report.pdf)

<sup>64</sup> [https://www.barnardos.ie/assets/files/publications/free/ADVO\\_child\\_abuse\\_through\\_the\\_internet.pdf](https://www.barnardos.ie/assets/files/publications/free/ADVO_child_abuse_through_the_internet.pdf)

<sup>65</sup> California Penal Code, Section 528. Available from: <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=528-539> (Accessed: 7 December 2015).

In the US the outlawing of online impersonation is regarded by some as a threat to First Amendment rights, concerned that the legislation could be used to target those who create parody accounts on Twitter or Facebook that are used for social commentary or satire<sup>66</sup>.

### ***Australia: fictional identity***

In 2004 South Australia's Criminal Law Consolidation Act 1935 was amended to provide that a person who assumes a false identity of another person (which can be a fictional identity) makes a 'false pretence'. Anyone who makes a false pretence intending to commit or facilitate the commission of a serious criminal offence (an indictable offence or a prescribed offence) is guilty of an offence. The new identity theft offences were not created specifically to deal with online predators masquerading as children but were targeted primarily at preventing the use of information for purposes such as fraud, money laundering, drug trafficking, illegal immigration and terrorism.<sup>67</sup>

A number of jurisdictions including Queensland, Australia<sup>68</sup> have introduced clauses permitting police to be pro-active through 'sting' operations before a child can be abused (which may involve the use of a fictional identity).

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<sup>66</sup> Lidsky, L. and Pinzon Garcia, A. (2012) *How not to Criminalize Cyberbullying* [Online] Available from: [http://www.meganmeierfoundation.org/cmss\\_files/attachmentlibrary/Cyberbullying-Laws.pdf](http://www.meganmeierfoundation.org/cmss_files/attachmentlibrary/Cyberbullying-Laws.pdf) (Accessed: 3 December 2015).

<sup>67</sup> The Australian Privacy Foundation (2003) Consultation Draft – Criminal Law Consolidation (Identity Theft) Amendment Bill 2003 Available from: <https://www.privacy.org.au/Papers/SubmnSAIdTheft0308.pdf> (Accessed: 3 December 2015).

<sup>68</sup> S 218A(7) of the *Criminal Code Act 1899*