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Prevention by All Means? A Legal Comparison of the Criminalization of Online Grooming and its Enforcement

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1. Introduction

For several decades now, criminal law has been enormously popular. It is no ‘real love’, however, but a necessity-based sympathy, driven by modern citizens’ fear of external danger. This is not a new phenomenon, since for ages people have gathered together to face collective danger. But now it is different: modern citizens’ fears are increasingly related to risks that are part of daily life. Where, previously, one could rely on the relative security of traditional social structures, social relationships have become fragmented under the influence of globalisation and individualisation.¹ Our modern Western civilisation is characterised by insecurity and the related supposed lack of safety. This includes a certain paradox: after all, shared insecurity offers opportunities for collective growth. However, for now, we appear to be unable to ‘look beyond our shadow’. Rather than recognising our shared vulnerability and mutual dependency and forging them into a connecting experience,² the modern citizen has taken the role of a claimant, demanding individual safety from the State.

It is not very surprising that criminal law has a central role in this process, since criminal law traditionally has the task of safeguarding public order. As opposed to the classic criminal-law paradigm, however, in which criminal law works as the safe keeper of values that society has generally agreed on as important, it has now started to act as the designer of social values.³ Criminal law has taken on a ‘front position’, scanning society, as it were, for potential dangers and looking for means to avert them. In order to do so, the traditional boundaries of criminal law

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1 Boutellier, following Bauman, uses the term ‘liquid society’. H. Boutellier, *De improvisatiemaatschappij. Over de sociale ordening van een onbegrensde wereld*, 2010.

2 Boutellier mentions the necessity of a ‘counter-democracy’ (‘tegendemocratie’). Boutellier, supra note 1, pp. 91-94.

3 Boutellier refers to this as ‘moral inversion’ (‘morele inversie’). Boutellier, supra note 1, pp. 73-76.

and criminal procedure are increasingly being stretched. This development is expressively referred to as ‘precautionary criminal law’ (in Dutch: ‘*voorzorgstrafrecht*’).⁴

One of the areas in which this tendency is clear is decency legislation. Again, this is not surprising, since major interests are at stake here, especially where it concerns children. The social task of preventing the sexual abuse of children is a continual source of concern for governmental criminal-law departments.⁵ These concerns are currently becoming stronger due to the rise of the Internet, with its inherent risks of the sexual manipulation of children.

The Internet, as illustrated by the name ‘worldwide web’, is a cross-border phenomenon. Combined with the fact that the fight against the sexual abuse of children has long been a priority of the international community, some action in this regard was to be expected. At the European level, this has recently resulted in the drafting of the Lanzarote Convention (hereafter ‘the Convention’) by the Council of Europe and the submission of a proposal for a Directive by the European Commission (European Union). Both these instruments have the aim to combat the sexual abuse of children through the Internet, e.g. by making grooming a criminal offence.

Contrary to what would be expected in the light of this European consensus, this criminalization is rather problematic. It does not merely concern the criminalization of preparatory acts; it is also foreseeable that the enforcement of this criminalization will skirt the borders of criminal procedure. An additional problem is that no prior analysis was made of the nature and size of the problem, due to which the new measures are now based on an incorrect perception of grooming.⁶ All this gives us good reason to believe that the criminalization of grooming at the European level has not been very well prepared.

What is clear, however, is that grooming must inevitably be made a criminal offence in the European area of justice. A number of Member States have already made it a criminal offence,⁷ but in the near future the majority of Member States will be faced with the new task of implementing the double European obligation to make grooming a criminal offence at the national level. The possibility that the European instruments may not be sufficiently detailed as regards necessity and consequences does not change this obligation.

However, the planned obligation to make grooming a criminal offence will still need to be critically considered, all the more so since the majority of European States have yet to comply with this obligation. Here we can learn from the experiences in the European States that have already made grooming a criminal offence.

It is especially the English legal practice that attracts attention. Grooming was made a criminal offence in 2003 and since then the number of registered cases of grooming, including a small amount of convictions in England and Wales, has gradually increased.⁸ This suggests that

4 For more about the emergence of precautionary criminal law in the Netherlands: R. Pieterman, *De voorzorgcultuur*, 2005. M. Hildebrand & R. Pieterman, *Zorg om voorzorg*, 2010. M.J. Borgers, *De vlucht vooruit* (oratie VU), 2007.

5 R. Lippens, “‘We zijn al waar we moeten zijn’: Beschouwingen omtrent de voorzorgcultuur”, in M. Hildebrand & R. Pieterman, *Zorg om voorzorg*, 2010, p. 221. Lippens expresses the belief that the precautionary principle will mainly be applied in a domestic setting and the immediate environment, which have a direct effect on the quality of daily life.

6 After the coming into force of the Convention, the European Commission introduced the European Online Grooming Project. This project, embedded within the EU’s Safer Internet Plus Programme, provides for a consortium of experts, mainly concentrated in the UK, Norway, Italy and Belgium. The aim is to contribute to the international body of policy and practical knowledge regarding grooming. The first annual report was published in July 2010: S. Webster et al., *Annual Report*, followed by a (first) literature and policy review (February 2011): J. Davidson et al., *Online Abuse: Literature and Policy Context*, <<http://europeanonlinegroomingproject.com>>.

7 These countries are: England and Wales, Scotland, Ireland, Germany and Norway; Webster et al., *supra* note 6. Very recently, the Netherlands has also made grooming a criminal offence. This must be viewed, however, in connection with signing the Convention. Act of 26 November 2009, *Stbl.* 2009, 544, entry into force 1 January 2010.

8 To be concise, in the following ‘England’ and ‘English criminal law’ are used to indicate the territory of England and Wales and the relevant criminal legislation.

the English criminalization of grooming fills an actual need and can be adequately enforced. There is one ‘but’ in this respect: English criminal law is part of the common-law tradition, a system that is different from that in most other European States. For this reason and for reasons related to the author’s expertise, the description of the English situation will be complemented with a case from the continental tradition, i.e. the Netherlands.⁹ The focus will be on the English system, since it is clearly ahead, and the Dutch system will be presented in comparison.

My previous description of the development of precautionary criminal law illustrates that this article offers more than just a ‘practical learning opportunity’. First and foremost, I aim to assess the essential and practical effects of making grooming a criminal offence. To this end, I will present an analysis of the criminal-law debate, focusing on the meaning of the criminal provisions, their wording and the entailing problems of evidence (intention, causality and acts towards committing an offence). I will discuss related problems of enforcement, especially the necessity for proactive powers of investigation and relevant risks. First, however, the concept of grooming will be described, including a description of the underlying characteristics of offenders and victims (Section 2). This will be followed by the current state of affairs at the European level (Section 3). After the discussion of the English and Dutch cases (Sections 4 and 5), Section 6 will answer the question of whether the European obligation to make grooming a criminal offence is part of precautionary criminal law and which conclusions can be drawn.

2. Online grooming: some characteristics of the offence, offenders and victims

Online grooming can be described as ‘an adult actively approaching and seducing children via the Internet (especially through social network sites, profile sites, chat rooms, news groups etc.), with the ultimate intention of committing sexual abuse or producing child pornographic material depicting the child concerned’.¹⁰ Although grooming has always existed, the online version thereof is relatively new.¹¹ Digital communication has enormously increased in Western societies. Research into young people’s Internet behaviour has shown that they spend a considerable part of their free time roaming the Internet, often with insufficient supervision. The Internet offers potential abusers ample opportunity to enter into digital contact with children in relative anonymity, which can lead to offline and/or online sexual abuse. Since there is little willingness to report sexual abuse, it is difficult to form a good impression of the number of digital contacts between children and potential offenders and resulting sexual abuse. The estimates are generally based on self-reports by children.¹²

What should be kept in mind is that for grooming to be a criminal offence, as referred to in European regulations, at least one act towards committing the offence is required, aiming to organize a meeting with the child and intending to have sexual contact. This is important, since often a broader description of grooming is used. The term then refers to a wide range of actions, including the digital performance of sexual acts and producing images of such performance that are sent or exchanged, e.g. using a webcam or mobile telephone (so-called ‘sexting’). It is

9 R.S.B. Kool, ‘Better safe, than sorry? Over de legitimiteit van strafbaarstelling van seksueel corrumpieren van minderjarigen en grooming’, 2010 *Delikt en Delinkwent*, pp. 1264-1294.

10 This description has been copied from the *Aanwijzing kinderpornografie* of the *Nederlandse College van Procureurs-generaal* (2010A025), effective since 1 January 2011.

11 Although the term grooming can indicate both online and offline processes of seduction, the term is here reserved for online grooming.

12 J. Wolak et al., ‘Internet-initiated sex crimes against minors: an implication for prevention based findings from a national study’, 2004 *Journal of Adolescent Health*, pp. 414.e11-424.220. Gallup, *Towards a safer use of the internet for children in the EU- a parents’ perspective* 2008, <http://ec.europa.eu/public_opinion/flash/fl_248_en.pdf>.

important to distinguish this latter category of actions, also called ‘online solicitation’, from online grooming,¹³ because the criminal aspect of online solicitation is based on the indecency of the digital observation of the sexual act,¹⁴ whereas the criminal aspect of grooming is based on the underlying indecent intention and not the indecency of any of the digital communication itself. Digital communication without additional acts is therefore not a criminal offence.

In addition to the fact that for online solicitation contacts are purely digital, the criminal profile also differs from the profile for grooming. Where the latter pertains to online contacts between older adults and children, for online solicitation such contacts are often between young people, or between children and young adults. The offenders are usually adolescents or no older than in their thirties or forties, who appear to prefer younger, digitally participating sex partners.

This does not mean that for grooming the profile for the offence and the offender is unambiguous.¹⁵ As opposed to what is commonly assumed, it is not related to a classic paedosexual profile.¹⁶ Webster et al. distinguish three types of groomers.¹⁷ First, there is the ‘distorted groomer’, who sees the grooming to be in support of the building of a relationship with a young person. As a rule, this type of offender limits himself to one contact. Moreover, they do not have mutual contacts with other groomers and are less likely to possess child pornography. The second type of offender is the ‘adaptable online groomer’. He acts from an offence support that involves his own needs, seeing the young person as mature and capable. Opposite to the ‘distorted groomer’, this type of offender does not analyse the encounter with the young person in terms of a ‘relationship’. Finally, there is a group of ‘hyper-sexualised men’. Their contacts with young persons are highly sexualised and escalate very quickly. Moreover, they are likely to be in possession of child pornography and have significant online contact with other sex offenders.

Other studies confirm the possession, distribution or production of child pornography to be an indicator for grooming.¹⁸ This connection applies to various sexual offences, however, which makes it a little less relevant. Another shared characteristic found for offenders is a previous history as a sexual offender. Although this latter characteristic does not apply to the majority of offenders, it does apply to a substantial minority.

In addition to differences in offender profiles, differences have been found regarding working methods. As is true for the profile, the following description is not conclusive, but it only presents an impression of what can be found on the subject in the literature. The description

13 J. Wolak et al., *1 in 7 youth threatened by “online predators”?*, <<http://cyber.law.harvard.edu/research/isttf/RAB>>; S. Schrock & D. Boyd, *Online threats to youth: solicitation, harassment, and problematic content: a review by the Research Advisory Board of the Internet Safety Technical Task Force*, <<http://cyber.law.harvard.edu/research/isttf/RAB>>.

14 In Dutch criminal law, this is punishable as an indecent act (Art. 247 DCC). No physical contact is required (HR 30 November 2004, *NJ* 2005, 184). English law requires no physical contact either (Section 11 SOA 2003, ‘Engaging in a sexual activity in the presence of a child’). Also: R. Card, *Card Cross and Jones Criminal Law*, 2006, Chapter 8, Par. 8. 38.

15 A.-M. McAlinden, ‘Managing risk: From regulation to the reintegration of sexual offenders’, 2006 *Criminology and Criminal Justice* 6, no. 2, pp. 197-218; S. McLaughlin, ‘Online sexual grooming of children and the law’, 2009 *Communications Law* 14, no. 1, pp. 8-19; E. Martellozzo, *Understanding online grooming in the 21st century A case study of the London Metropolitan Police*, Middlesex University, paper 2009, <www.allacademics.com>.

16 This is what is suggested in English policy documents, e.g. Home Office, *Protecting the public. Strengthening protection against sex offenders and reforming the law on sexual offenders*, 2002. Grooming is described as: ‘a course of conduct enacted by a suspected paedophile [emphasis added], which would give a reasonable person cause for concern that any meeting with a child arising from the conduct would be for unlawful purposes.’

17 S. Webster et al., *Scoping report*, European Online Grooming Project, April 2010, <www.europeanonlinegroomingproject.com>. See also: J. Davidson & E. Martellozzo, ‘Protecting children online: towards a safer Internet’, in G. Letherby et al. (eds.), *Sex Crime*, 2008.

18 E.g. A.R. Beech et al., ‘The Internet and child sexual offending: A criminological review’, 2008 *Aggression and Violent Behavior* 13, p. 226; Kim-Kwang R. Choo, *Online child grooming: a literature review on the misuse of social networking sites for grooming children for sexual offences*, 2009, AIC Reports, Research and Public Policy Series 103, <<http://www.aic.gov.au/documents/3/C/1/%7B3C162CF7-94B1-4203-8C57-79F827168DD8%7Drpp103.pdf>>; K. Mitchell et al., ‘Police Posing as Juveniles Online to Catch Sex Offenders: Is it working?’, 2005 *Sexual Abuse: A Journal of Research and Treatment*, pp. 241-268.

is based on a recent literature review by Webster et al., who distinguish several stages of grooming.¹⁹

First, there is some triggering event, giving way to feelings of vulnerability by the offender. His potential for self-management being weakened, he is triggered to contact and groom a young person. What follows is the adaption of a grooming style, including different styles of targeting and planning. Subsequently, the offender has to justify his intentions. Being aware that grooming is a deviant activity, he has to find a justification to persevere his plan. This might be by finding support in joining forums for sex offenders, collecting indecent images of children or developing offence-supportive beliefs (e.g. the belief that the sexual contact is provoked by the youngster or serves 'educational goals'). Having accomplished such a process of de-individuation, indicating a loss of individual responsibility, the offender prepares to actually start grooming, e.g. by lodging a profile on social networking sites. Subsequently, the offender develops a digital profile, in order to mask his real identity. After having executed these preparatory activities, the offender initiates a first digital contact with a young person, to be followed by a risk management stage. Some groomers then choose to switch towards a more suitable profile, e.g. revealing to the youngster that he is a male friend, instead of the alleged female friend. The next stage is used to desensitise the young person, e.g. by sending explicit pictures or using explicit language. Next, the contact is intensified in order to maintain that contact, e.g. by sending gifts or switching to a more personal contact via a webcam. Finally, the grooming process is completed by planning and executing a meeting with the victim in order to have sex.

Not all stages mentioned need to be completed. Aggressive groomers, for example, tend to get straight to the point, do not spend too much time winning the child's trust and start talking about sex rather quickly,²⁰ thus creating a certain risk for themselves. An analysis of case descriptions has shown that this group of offenders often operate on sites with a sexual profile, e.g. gay sites. These sites, however, are the sites that the police tend to infiltrate, which means that these offenders have an increased chance of getting caught.

In addition to offence and offender characteristics, we can also distinguish certain characteristics of victims. There is basically one strong indication for victimization, and that is the child's social vulnerability. Research has shown that young people from a socially and emotionally poor background have a higher risk of being groomed, which should be viewed in relation to the degree of parental supervision of the child's online communication.²¹ Social vulnerability can also be caused by circumstances other than the child's immediate environment, e.g. homosexuality, bullying, failing to connect with peers because of being highly gifted or having problems due to a divorce. These victims are usually between the ages of ten and sixteen. This can be explained by the fact that younger children do not, or at least less often, communicate through the Internet. Furthermore, girls have a higher risk of being groomed than boys, but boys also form a substantial group of victims. Other indications of an increased risk are: the willing-

19 Webster et al., supra note 17. Also see: R. O'Connell, *A typology of cyberexploitation and online grooming practices*, 2003, <<http://www.iisc.ac.uk>> and S. Ost, *Child pornography and sexual grooming*, 2009, pp. 32-33.

20 Baines observes an increase in aggressive versions of grooming. She believes that this is connected to the increased awareness of the risks of grooming and the related increased risk of discovery, said to necessitate groomers to recruit more aggressively. Also worth mentioning is the trend that she observes of grooming via online gaming. V. Baines, *Online Child Sexual Abuse: the Law Enforcement Response*, ECPAT/VGTF/CEOP 2008, Par. 2.1.

21 M.L. Ybarra & K.J. Mitchell, 'Youth engaging in online harassment: associations with caregiver-child relationships, Internet use and personal characteristics', 2004 *Journal of Adolescence*, pp. 319-336. M. Barbovschi, 'Meet the "E-strangers". Predictors of Teenagers Online-Offline Encounters, *Cyberpsychology*', 2009 *Journal of Psychological Research on Cyberspace* 3, no. 1, <<http://www.cyberpsychology.eu>>. P. Rogers et al., 'Attributions of blame in a hypothetical internet solicitation case: role of victim naivety, parental neglect and respondent gender', 2010 *Journal of Sexual Aggression*, pp. 1-19.

ness to communicate with strangers and to exchange personal details with them, rude behaviour on the Internet, especially online sex talk and looking for pornography.²²

3. The European perspective

In the European area of justice, a distinction must be made between the legal instruments of the Council of Europe and those of the European Union. Although the majority of European States are members of both, this is not true for all countries.²³ Both platforms have for several decades had an active policy regarding the fight against sexual offences and the sexual exploitation of children. In this context, it has now been recognised that there is a need to effectively combat sexual forms of cybercrime.²⁴ The Council of Europe has the Convention on Cybercrime,²⁵ which forms the basis of the Convention of Lanzarote (2010).²⁶ In view of the cross-border nature of grooming, these Conventions aim to harmonise criminal legislation, combined with a broadly supported European enforcement policy.

This aim of the harmonisation and international coordination of enforcement is supported by the European Union: the European Commission has recently submitted a draft Directive, at the recommendation of the European Parliament.^{27, 28} This proposal is to replace the Framework Decision on combating the sexual exploitation of children and child pornography 2004²⁹ and is based on a Proposal for a Framework Decision from 2009. The latter was intended to replace the 2004 Framework Decision, the contents of which had been broadly agreed upon.³⁰ The main point in this draft Directive is the proposal to make grooming a criminal offence, as stated in the Convention. At the time of writing (April 2011), the Economic and Social Committee has just approved the draft Directive, and the proposal has been submitted to the Council of Ministers of the European Union.³¹

The intended policy as described above clearly indicates that European politicians have great concerns regarding the possible sexual abuse and sexual exploitation of children, especially combined with the options for the manipulation of children offered by the Internet. The preamble to the Convention even states that the sexual abuse of children has grown to 'worrying proportions', in particular as regards the use of the Internet.³² Together with the constant fight against the production and distribution of child pornography, at the European level this has resulted in an effort for a Europe-wide and high-quality level of protection, to be realised by criminalization and by establishing and coordinating collaborative efforts. Making grooming a criminal offence

22 J. Wolak et al., 'Online 'predators' and their victims: myths, realities and implications for prevention and treatment', 2008 *American psychologist*, pp. 111-128.

23 The Council of Europe has more members (47) than the European Union (27).

24 Reference may be made to the recent establishment by the European Union of the Cybercrime Task Force (June 2010); <<http://www.europol.europa.eu/index.asp?page=news&news=pr100622.htm>>.

25 Council of Europe, *Convention on Cybercrime*, ETS no. 185.

26 Council of Europe, *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007*, CETS 201.

27 European Parliament, *Recommendation of 3 February 2009 to the Council on combating sexual exploitation of children and child pornography*, 2008/2144(INI).

28 European Commission, *Combating sexual abuse, sexual exploitation of children and child pornography*, COM(2010) 0094.

29 COM(2004) 68/JHA.

30 COM(2009) 135. The planned framework decision of 2009 was overtaken by the Treaty of Lisbon entering into force (1 December 2009). It was decided to reshape the plans into a draft directive based on Arts. 82 and 83 of the Treaty on the Functioning of the European Union (TFEU). It should be noted that the draft directive includes more than the planned framework decision of 2009. See: *Kamerstukken II* (Dutch Parliamentary Papers) 2009/10, 22 112, no. 1029.

31 Council of the European Union, *Report of the Presidency*, 2 June 2010, 2010/0064 (COD).

32 Convention 2008, p. 1.

is part of this, article 23 Convention thereby containing an obligation to criminalise the solicitation of children for sexual purposes:

‘Each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child, who has not reached the age set in application of Article 18, paragraph 2, for the purposes of committing any of the offences, established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a against him or her, where this proposal has been followed by material acts leading to such a meeting.’³³

4. Grooming: England and Wales

4.1. Introduction

At the time, the English move to make grooming a criminal offence was part of a more comprehensive revision of English decency legislation that had been initiated several years before.³⁴ Around 2000, this amendment was accelerated because of a number of serious criminal cases. Especially the rape and murder of Sarah Payne caused a public outcry.³⁵ Although Sarah Payne was not groomed, her tragic death stirred up the ever present public fear of minors being at risk of sexual abuse.³⁶ Moreover, in that same year, another suspect who had kidnapped a little girl intending to commit sexual abuse had been freed because the police had intervened before he could actually commit a sexual offence, and there were no criminal provisions to cover what had been done.³⁷ Shortly afterwards, there were a number of other attempts to seduce children.³⁸

All this resulted in a public outcry for ‘a pre-emptive piece of legislation’ or to make grooming a criminal offence.³⁹ After all, that would be the only way to allow timely intervention, without the child being in actual danger because of the acts towards committing the offence that are required for it to qualify as an attempt. The proposal to make grooming a criminal offence as an act towards committing an offence was originally met by some objections. Before going into those objections, however, I should describe the nature and contents of the criminal provi-

33 For a clear understanding of Art. 23 of the Convention: Art. 18(2) Convention leaves it up to the Member States to decide upon the prohibition of engaging in sexual activities with a child. Art. 20(1.a) refers to the production of child pornography.

34 It concerned an amendment of the Sexual Offences Act 1956. Since the mid-eighties, England has seen increased attention for sexual abuse and policy has been tightened. See: S. Ashenden, *Governing child sexual abuse. Negotiating the boundaries of public and private, law and science*, 2004. In Scotland, grooming was made a criminal offence at a later date, and is part of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill 2005.

35 Home Office, *Consultation paper on the review of Part 1 of the Sex Offenders Act 1997*, July 2001. The offender had previously been convicted of sexual abuse and was registered in the Sex Offenders Register, which at the time was only accessible for the authorities. Social pressure resulted in experiments with controlled access to the Sex Offenders Register for parents, at four locations from 2008 (‘Sarah’s Law’). In the spring of 2011, the Child Sex Offender Disclosure Scheme will become applicable throughout England and Wales, <www.homeoffice.gov.uk/crime/child-sex-offender-disclosure>.

36 S. Ost, ‘Getting to grips with sexual grooming? The new offence under the Sexual Offences Act 2003’, 2004 *Journal of Social Welfare and Family Law*, pp. 147-159.

37 At the time, the options for litigation were limited to proceedings for attempt or incitement to commit a sexual offence. The latter was punishable based on Section 1 Indecency with Children Act 1960. Cf. *R v Rowley*, [1991] 4 All ER 649; *R v Geddes*, [1996] Crim. L.R. 895. Also see: S. Craven et al., ‘Current Responses to Sexual Grooming: Implication for Prevention’, 2007 *The Howard Journal*, pp. 60-71.

38 E.g. Re Attorney General’s reference (No 41 of 2000) [2001] 1 Cr App R (S) 372. The original sentence for indecent assault and making indecent photographs of a child was increased, because the offender had sexually groomed a vulnerable child with special needs.

39 W. Gardner, *The Sexual Offences Bill: Progress and the Future*, Childnet International 2003, <<http://www.childnet-int.org/downloads/online-grooming2.pdf>>. W. Gardner, *Online grooming and UK law. A submission by Childnet International to the Home Office*, 2000, <<http://www.childnet-int.org/downloads/online-grooming.pdf>>. Also see: Ost, supra note 36, p. 153; Ost mentions reluctance among the police to await the finalising of an attempt (a meeting) because this would endanger the child. E.g. *R v Geddes*, [1996] Crim. L. R. 895.

sions as included in Section 15 SOA 2003.⁴⁰ Section 15 SOA 2003, insofar as is relevant here, reads:

- ‘(1) A person aged 18 or over (A) commits an offence if
- (a) having met or communicated with another person (B) on at least two earlier occasions, he
 - (i) intentionally meets B, or
 - (ii) travels with the intention of meeting B in any part of the world,
 - (b) at the time, he intends to do anything to or in respect of B, during or after the meeting and in any part of the world, which if done will involve the commission by A of a relevant offence,
 - (c) B is under 16, and
 - (d) A does not reasonably believe that B is 16 or over.’
- (2) In subsection (1)
- (...)
- b) “relevant offence” means—
- (i) an offence under this Part (...).

Accordingly, for something to qualify as grooming, there are two requirements: the act committed must answer to the *actus reus* as well as the *mens rea* requirement.⁴¹

4.2. The *actus reus* requirement

First, the condition that the suspect has committed a relevant act (*actus reus*) in relation to a child under 16. With regard to the age requirement, there is a possible defence: the suspect can argue that he had no reasonable indication to believe that the victim was under 16.⁴² The criterion here is the more lenient requirement for ‘negligence’, which means that the suspect must be able to prove that he have made sufficient efforts to be sure about the child’s age. It is up to the court to assess whether this requirement has been fulfilled and this is assessed based on the background of the relevant case; the suspect’s personal characteristics are not relevant here.⁴³ Regarding the offender, it is provided that they have to be 18 or over, unlike what is provided for the other offences included in SOA 2003.⁴⁴

4.3. The *mens rea* requirement

The second requirement is that the act must have been committed with the intention of sexual abuse (*mens rea*). This must involve ‘a persistent and continued course of conduct’, expressed in the condition that the offender has been in contact or has communicated with the child on two

40 Card, *supra* note 14, Chapter 8, Par. 8.38. Section 14 SOA 2003 describes the process of grooming,

41 The National Archive, *Sexual Offenders Act 2003, chapter 42. Explanatory Notes*, <www.legislation.gov.uk/ukpga/2003/42/notes/contents>. Also: Crown Prosecution Service, *Legal Guidance, Sexual Offence Act 2003*, <http://www.cps.gov.uk/legal/s_to_u/sexual_offences_act>.

42 Card, *supra* note 14, Chapter 8, Par. 8.10. Under English criminal law, sixteen is the ‘age of consent’. A child younger than sixteen having consented does not result in impunity, but this may be a reason for a reduced sentence. For children under thirteen, however, it is legally irrelevant whether they consented to the sexual contact.

43 That the child can play a deceiving role is evident from *R v Jon Dixon*, [2008] EWCA Crim 2026. In this case, for several months a digital ‘relationship’ developed between an eleven-year-old girl and a twenty-year-old man. The girl consistently pretended to be sixteen years old and explicitly communicated her wish to have sex with the suspect. Only when they were planning to meet, did she reveal her actual age. The suspect first responded by pulling out, but changed his mind and – with the girl’s full consent – started a physical, sexual relationship. This fact did not affect the suspect’s punishability, but it did result in a reduced sentence.

44 The English criminal legislator, contrary to its Dutch colleague, did not wish to make grooming between children a criminal offence (see Section 5 of this article).

earlier occasions (so-called initial communication). Following these two earlier contacts, which need not be of a sexual nature, a meeting must take place, or there must be evidence that the offender is committing acts towards organising another meeting. The child need not know about the intended meeting, it is sufficient that the offender's acts give reason to believe that he started off with the intention of meeting the child. Moreover, it is not required that this actual meeting was meant to include sexual contact, it is sufficient to establish that this meeting is part of a communication process serving the suspect's intention to have sexual contact.⁴⁵ In the system of English criminal law, it concerns 'direct intention'.⁴⁶ Evidence must be supplied in the form of transcriptions of chat sessions, email messages (to the child or to others), text messages or items that the suspect was carrying at the time of his arrest (condoms, lubricant, alcoholic beverages or other drugs) or otherwise, such as public transport tickets or hotel reservations.⁴⁷

4.4. Penalties and measures

In addition to this description of the criminal provisions, it is important to provide some information on the determination of the punishment. Grooming is an offence that is triable either way: it can be dealt with by the Magistrates' Courts or by the Crown Courts. The maximum prison sentence is ten years (imposed by a Crown Court; a Magistrates' Court can only impose a maximum prison sentence of six months).⁴⁸ The Sentencing Guidelines for the Sexual Offences Act 2003 give instructions to determine individual sentences.⁴⁹ The starting point for the sentence is the degree of culpability, combined with the nature and seriousness of the harm caused by the grooming acts. Determining factors here are the degree to which the grooming was planned, its sophistication, the determination of the offender and how close the offender came to committing the envisaged sexual contact and the reason why it did not succeed.

For a clear picture of English criminal-law practice with regard to sexual offences it is necessary to describe what position prevention has therein. To this end, Part II SOA 2003 includes a comprehensive set of conditions (so-called Sexual Offence Prevention Orders; SOPOs), which can be imposed as part of a criminal sentence. These conditions can vary widely, from obligatory registration as a sexual offender, a periodic obligation to report or to allow the police to enter the home and access the home for police check-ups. These conditions serve only one purpose: to prevent the convicted sexual offender from repeating the offence, to be achieved by locally supervising the convicted person.

But there is more. The SOA 2003 also includes the option to impose a preventative measure when there has been no previous criminal conviction: the Risk Offender Sexual Harm Order (RSHO; Sections 123-9 SOA 2003). This is a civil-law measure to be applied for by the police and to be imposed by the Magistrates' Courts. It actually pertains to the phase prior to grooming, since it can be imposed as soon as it can be reasonably assumed that it is necessary to prevent a child from suffering harm from the person on whom the order is to be imposed. It needs evidence that in a previous period of six months the person involved has twice exhibited explicit sexual

45 Section 15 SOA 2003 states that the intention must be aimed at committing 'a relevant offence', in other words one of the sexual offences vis-à-vis children listed in Schedule 3 SOA 2003. It is not required, for that matter, that the intended sexual abuse would eventually have taken place on English territory (Section 15(1)b SOA 2003). This also applies to possible prior contacts (Section 15 Subsection 2(a) SOA 2003).

46 J. Martin & T. Storey, *Unlocking Criminal Law*, 2010, Par. 3.2.1.

47 Home Office, *Sexual Offences Bill: Explanatory Notes, explanatory note to Clause 17*, 2003.

48 The maximum sentence for grooming was initially set at five years' imprisonment, which was subsequently increased to seven. With a view to the necessary coordination with the maximum sentences for other sexual offences with children, the maximum was eventually increased to ten years' imprisonment.

49 Crown Prosecution Service, *Crown Prosecution Service Sentencing Manual: legal guide*, <www.cps.gov.uk/legal/s_to_u/sentencing_manual/s15_grooming>.

behaviour towards a child or has communicated with the child in a sexually explicit manner.⁵⁰ As opposed to grooming, no meeting or act towards organising a meeting is involved here.⁵¹

4.5. Nature of the offence

The above clarifies that the English legislator considers grooming as a preparatory act, made concrete by two previous contacts and a subsequent act towards committing the offence. The previous acts are harmless in themselves and only become harmful when connected to the offender's intention to sexually abuse the child in the future. At the time, the objection was that it involved the criminalization of thoughts ('thought crime').⁵² The combination with the open wording of the description of the offence was referred to as a 'catch-all offence'.⁵³ It was suggested that Section 15 SOA 2003 should be restricted by including the condition that the two previous contacts had to be of a sexual nature and that the offender had acted in a deceiving manner.⁵⁴ This suggestion was rejected at the time. Even if it had been accepted, this would not have solved the fundamental objection that it involved the criminalization of basically harmless acts. Although it would have created more clarity regarding the offender's objectionable intention, the objection remains that it leaves no room for the offender to eventually refrain from completing the act.

4.6. Enforcement

English practice has now shown that Section 15 SOA 2003 is not a dead letter. Every year sees a substantial number of registered cases of grooming.⁵⁵ When taken into close consideration, a few things can be said against this success. First, there is the question of whether in the relevant cases sexual abuse was actually prevented. After all, the provision serves to prevent sexual abuse. If the conviction followed in a case where the victim was sexually abused, this purpose was not achieved, which means that a lawsuit for grooming has no added value. Normally, this question could be answered by studying the case law. The English criminal-law system, however, does not include a tradition of delivering judgments in writing with the related publication of judgments. Some judgments are published, but these only contain a selection and are often judgments

50 Also see Craven et al., supra note 37, p. 66. Craven et al. note that it is difficult for the police to determine the moment of the request, all the more so because the law has no unambiguous definition of grooming.

51 The similarity between the scope of the RSHO and grooming is also clear from the description given of reasonable belief in the Explanatory Notes. Sections 123-126 SOA 2003 list finding condoms on the suspect or the unsolicited sending of child pornographic material. These are instruments also known to be used in the grooming of children.

52 Liberty, *Liberty's proposed amendments to Part 1 of the Sexual Offences Bill for the Committee Stage in the House of Lords*, 2003. Gardner 2003, supra note 39 considers this an incorrect qualification, since the communication is 'incontrovertibly linked' to the intended sexual abuse.

53 Ost, supra note 36, p. 512. Also see: J. Hörnle, *Countering the dangers of online pornography- shrewd regulation or lewd content?*, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 65/2010, <<http://ssrn.com/abstract=1686136>>.

54 Liberty, supra note 52, p. 17

55 Home Office, *Research Development and Statistics Website*, <<http://rds.homeoffice.gov.uk/rds/recordedcrime-1.html>>. See the spreadsheet listed under: key publication, a summary of recorded crime data from 2002/03 to 2009/10. This spreadsheet presents the following numbers of registered cases for the violation of Section 15 Sexual Offences Act 2003: 2004/05:186; 2005/06:237; 2006/07:322; 2007/08:271, 2008/09:314 and 2009/10:405. Also see: Home Office, Child Exploitation and Protection Centre (CEOP), *The way forward*, 2010, CM7785. Also: Davidson & Martellozzo, supra note 17, p. 5, mentioning several recent convictions. It should be noted that the number of convictions based upon a violation of Section 15 SOA is limited; the majority of the registered cases concern pre-trial custody.

of the higher courts.⁵⁶ This means that it is impossible to gain a clear insight into the interpretation of the criminal provisions and the possible entailing problems.

There is a second aspect, however, that may detract from the English success story, and that is the question regarding how the investigation is organised. In the introduction I noted that the enforcement of grooming will probably skirt the borders of criminal procedure. Whether this is true can be analysed on the basis of English criminal-law practice. How is grooming enforced there and to what extent does enforcement include proactive investigation?⁵⁷ For this aspect, there is no systematic case law that can be used to find information either. Moreover, as the majority of cases are settled by plea bargaining, evidence is not disclosed to or scrutinized by a court.⁵⁸ Still, details regarding the course of procedure can be found in other sources. Reports from the Child Exploitation and Online Protection Centre (CEOP),⁵⁹ for example, show that covert investigators are frequently used.⁶⁰ This may be part of the job, but also after victim reports. To encourage the latter, the CEOP has set up collaboration with providers and placed a ‘button’ (‘app’) on a large number of websites, which children can click to report sexual offences. Following such reports, covert investigators are often used to detect the groomer. And there are other descriptions of investigation practices that indicate infiltration-like detection activities, such as creating decoy profiles and, less often, decoy websites (‘honey pots’).⁶¹

Assuming that proactive detection activities are a regular part of English criminal-law practice regarding grooming, the question arises whether they comply with the ECHR’s requirements. It particularly needs to be considered how proactive detection of grooming relates to the right to privacy as safeguarded in Article 8 ECHR. Another major point of attention is to what extent this involves entrapment: does the covert investigator make suspects commit acts that they would not have committed without that intervention? This last point touches on the question of whether this can be considered a fair trial (Article 6 ECHR).

56 Moreover, English law does not always offer the standard of full appeal. In an appeal from a Magistrates’ Court, the Crown Court will simply retry the case, i.e. rehear and decide on the facts. Under the Criminal Appeal Act 1995, however, a conviction of the Crown Court is not allowed standard appeal. One of the grounds to allow an appeal against conviction is the impression that the conviction is ‘unsafe’, necessarily involving a re-evaluation of the facts. Most judgments in appeal cases that are published in connection with Section 15 SOA 2003 are published with regard to appeals against the imposition and/or contents of SOPOs.

57 In this article, where the term ‘special investigation powers’ is used, it refers to police powers for proactive detection. The term is based on the Dutch Special Investigative Powers Act (*Wet Bijzondere Opsporingsbevoegdheden; Wet BOB*), which is part of Book I, Title IVa and V of the Dutch Code of Criminal Procedure. English criminal law does not have any similar separate catalogue of special powers; these are provided in separate statutes.

58 E. Cape & J. Hodgson, ‘The investigative stage of the criminal process in England’, in E. Cape et al. (eds.), *Suspects in Europe*, 2005, p. 74. Cape and Hodgson state that 90% of defendants plea guilty.

59 The CEOP is a government-initiated centre of expertise. At the national level, it cooperates with ministries, internet providers, schools and sports clubs. Internationally, the CEOP is part of the Virtual Global Task Force, a collaboration of police forces in Australia, New Zealand, Canada and the United States.

60 CEOP, *Annual Review 2009-10*, 2010. Forty percent of the CEOP’s working hours are spent on detecting grooming, including frequent covert online operations. Also see: Martellozzo 2009, supra note 15. Baines, supra note 20, p. 13 describes a CEOP pilot with so-called Paedophile Online Investigation Teams (POLITs).

61 E. Martellozzo, *Policing online Child Sexual Abuse: Understanding grooming in the 21st Century*, paper presented at the House of Lords, 26 March 2010. Also see: J. Davidson & P. Gottschalk, *Internet Child Abuse: Current Research and Policy*, 2010; J. Davidson & P. Gottschalk, *Online groomers – Profiling, policing and Prevention*, 2011. Authors mention national and local High Technology Crime Units employing undercover agents. For the United States: L. Penna et al., *Challenges of automating the detection of paedophile activity on the internet*, Proceedings of the first International Workshop on Systematic Approaches to Digital Engineering, 2005; G.R. Newman, *Sting operators*, US Department of Justice, Office Community of Oriented Policing Services (COPS), Problem-Oriented Guides for Police, Response Guide Series no. 6, 2007; R. Moore et al. ‘Entrapped on the Web? Applying entrapment defense in cases involving online sting operations’, 2007 *American Journal of Justice* 32, pp. 87-98. For Australia and New Zealand: G. Griffith & L. Roth, *Protecting Children from Online Sexual Predators*, NSW Parliamentary Library Research Service, Briefing Paper no. 10/07, 2007; T. Krone, ‘Queensland police stings in online chat rooms’, 2005 *Trends and Issues in crime and criminal justice*, no. 301, <<http://www.aic.gov.au/publications/current%20series/tandi/301-320/tandi301.aspx>>; Choo, supra note 18. For a comparative review: J.E. Ross, ‘Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint’, 2008 *Annual Review of Law and Social Science* 4, pp. 239-273. Honey pots are used to collect tactical information that serves as a basis for further investigation.

The question of whether there is a violation of the right to privacy must be answered along the lines set out in the ECtHR's case law. The ECtHR's decision must be interpreted in the context of the relevant case, where it must be kept in mind that the Member States are allowed a certain margin of appreciation. This makes it important to emphasise the somewhat toned-down views regarding privacy that apply in English criminal-law practice, which can be explained by the specific position of the police force in the public system: As opposed to the continental criminal-law system, the police force is not primarily considered as a 'criminal-law authority', but as the community's 'long arm', which enforces public order on behalf of the community and initiates lawsuits if necessary.⁶² As a consequence of the fact that the English police operate so close to the community, people do not easily assume that they would violate the right to privacy. At the same time, this autonomous position entails that the police cover all parts of the investigative process, including the control of proactive detection activities.

With this in mind, the question arises on which basis the English police infiltrate websites and how this relates to the right to privacy based on Article 8(1) ECHR. When answering this question a distinction must be made between public and non-public websites. Moreover, it must be kept in mind that the infiltration of websites to detect grooming activities goes hand in hand with deception.⁶³ What are the rules regarding privacy when infiltrating a public website? The basic rule is that on public websites no rights to privacy apply, or at least strongly reduced rights. After all, it is an essentially open environment where no privacy is actually expected. Insofar as any privacy is expected, the details that are exchanged may be of a personal nature, but do not reveal a full picture of the suspect's daily life. Also, any rights to privacy here are rather relative, since the police publicly announce their infiltration activities. This publicity is part of the strategy, aimed at counteracting the idea that the Internet is a safe environment for grooming.⁶⁴ Possible objections may be that it is unclear for what reason a certain website is infiltrated, and moreover, that it involves deception. In English criminal law, however, the requirements triggering police action are not very strict, which should be interpreted in the light of the position of the police force as described above.⁶⁵ Along the same lines, there is no sharp distinction between a proactive and a reactive investigation. 'Firm' suspicions are not required for the infiltration of public websites, certainly since currently there are 'mild' suspicions that certain websites are used for grooming, based on previous investigations (especially on child pornography). From an English standpoint, if the police limit the initiation of their activities to a basic analysis, the right to privacy is no obstacle.⁶⁶ By logging in on a suspicious website, establishing

62 S. Field, 'Judicial Supervision and the Pre-Trial Process', 1994 *Journal of Law and Society*, pp. 119-135. C. Brants & S. Field, 'Legal Cultures, Political Cultures and Procedural Decisions: Towards A Comparative Interpretation of Covert and Proactive Policing in England and Wales and the Netherlands', in D. Nelken (ed.), *Contrasting Criminal Justice*, 2000, pp. 77-116; C. Brants & A. Ringnalda, *Issues of convergence: inquisitorial prosecution in England and Wales?*, 2011, Part II, Par. 2.

63 It must be emphasised in this context that the infiltration of websites for the detection of grooming requires expertise (learning internet language and manners (so-called 'netiquette') as used by children). Moreover, infiltration takes up staff capacity due to the lengthy and at times time-consuming contacts to be maintained with suspected groomers. Finally, the police incur costs in buying data from providers. The CEOP annually reserves ^ 100,000 for this purpose (Baines, supra note 20, p. 14). The need for specialisation is frequently mentioned as a condition for international cooperation. In this context, it should be noted that there is a certain connection between grooming and the possession, production etc. of child pornography. S. Kierkegaard, 'Cybering, online grooming and ageplay', 2008 *Computer Law & Security Report*, pp. 41-55. Martellozzo 2010, supra note 61.

64 Newman, supra note 61. Ashworth believes this is no valid argument to legitimise infiltration: A.S. Ashworth, 'Testing Fidelity to Legal Values: Official Involvement and Criminal Justice', 2000 *The Modern Law Review*, pp. 633-659.

65 G. Knigge & N.J.M. Kwakman, 'Het opsporingsbegrip en de normering van de opsporingstaak', in M.S. Groenhuijsen & G. Knigge, *Vooronderzoek in strafzaken. Tweede Interimrapport Onderzoeksproject Strafvordering*, 2001, Par. 4.2.2.

66 J. Ross, 'Tradeoffs in undercover investigations: a comparative perspective', 2002 *University of Chicago Law Review* 69, pp. 337-363. According to Ross, the common law tradition only adds relative value to the right to privacy. Further: Ashworth, supra note 64. Ashworth believes that stricter requirements should be set for access to proactive detection methods, e.g. a reasonable suspicion. Also: Brants & Field, supra note 62.

digital contact with a child and then starting sexually-tinted communication, the suspect takes the risk of running into a covert investigator and arousing a suspicion that they are looking for opportunities for sexual abuse.

In terms of criminal procedure, the situation changes when the suspect or covert investigator indicates that they wish to continue the communication on a non-public website.⁶⁷ This is because for non-public websites, the right to privacy is expected to be observed. Continuation of the digital contact implies a violation of the right to privacy and, according to the ECtHR's standards, it needs a specific legal basis, which is provided in the Regulation of Investigation Powers Act 2000 (RIPA 2000) and accompanying Codes of Practice. These regulations, however, should also be interpreted in the light of the above description of the autonomous position of the police and the relatively mild views regarding the right to privacy.

Looking at the proactive detection of grooming, it concerns 'direct covert surveillance'.⁶⁸ This can be initiated for a 'specific investigation or operation'.⁶⁹ Furthermore, one of the broadly formulated grounds as stated in Section 28 RIPA 2000 must be satisfied, which includes the prevention and detection of criminal offences. The decision that in the circumstances of the relevant case these conditions are complied with is made by a higher-ranking police officer of the same police force (local or other), who authorizes the use of covert surveillance.⁷⁰ The necessity and proportionality of the use of covert surveillance must be assessed.⁷¹ This must include an analysis of whether privacy is expected to be observed. Orders for authorisation are registered at a local level.⁷²

It will be clear that this assessment framework not only implies monitoring by the same police force,⁷³ but also that the authorising police officer has a wide margin of discretion here.⁷⁴

After completing the investigation, the police present their file to the Crown Prosecution Service (CPS). The order to start covert surveillance must be included in this file. Reference should here be made to the tenet of disclosure: the disclosure of the file to the defence. The guidelines governing this are included, for example, in the Criminal Procedure and Investigation Act 1996 (CPIA 1996) and its accompanying Codes of Practice. It is true that disclosure is obligatory by statute, but due to the lack of any hierarchy between the police force and the CPS and the fact that the police generally tend to ignore the Crown Prosecution Service's instructions,

67 From a detection point of view, moving the communication to a non-public site creates an advantage, since it offers opportunities to find out personal details, in particular the IP address.

68 Section 26 in conjunction with 48 RIPA 2000. There are two types of covert surveillance: direct surveillance and intrusive surveillance. The latter implies a stronger violation of privacy and relates to entering residential premises or private vehicles. Section 26 RIPA 2000 also includes a third type of surveillance, covert human resource intelligence, but this is not applicable here either.

69 Covert Surveillance Code of Practice, Sections 1.9 and 4.1.

70 Authorisation can be issued for a maximum of twelve months and can be extended for another twelve months. Which police authority actually has the power to issue which authorisation can be found in: RIPA Prescriptions of Offices, Ranks and Position Order 2000, Part II, Section 30. Ashworth and Redmayne object to this division of powers. They believe that the RIPA 2000 fails to comply with the standards set by the ECtHR. A. Ashworth & M. Redmayne, *The Criminal Process*, 2010, p. 114.

71 Reference may be made here to the low level of the willingness to report sexual offences, which is even lower for grooming since the trust developed between victim and offender frequently makes filing a report very difficult. Moore et al., *supra* note 61; D. Finkelhor & R.K. Ormrod, 'Reporting crimes against juveniles', 1999 *Juvenile Justice Bulletin*, no. 11.

72 Covert Surveillance, Code of Practice, Sections 2.4 and 2.5.

73 There is a higher supervisory body, the Office of Surveillance Commissioners, but this is not generally involved in individual criminal cases. Furthermore, any person who has been subjected to covert surveillance can file a complaint with the Tribunal Investigation Powers (RIPA 2000, Part IV, Section 76-80). The majority of these complaints are dismissed, however.

74 Covert Surveillance Code of Practice, Section 2.4 includes the requirement that 'the person granting an authorisation *believes* [emphasis added] that the authorisation is necessary'. A similar formulation applies to the requirement of proportionality as stated in Section 2.5.

the CPS only marginally checks the use of special investigation powers and disclosure.⁷⁵ Actual checks for possible unlawfulness during the investigation are therefore up to the court.⁷⁶ Courts have the authority to sanction any unlawfulness found by ordering the dismissal of the case or by excluding evidence, based on Section 78 PACE 1984, which regulates the tenet of ‘abuse of power’.⁷⁷

In addition to these irregularities (violation of privacy and denial of disclosure), any entrapment defence is also assessed based on this Section of the law, since English criminal law includes no statutory prohibition of entrapment. Entrapment is based on Section 78 PACE 1984, in combination with instructions presented in case law.⁷⁸ For entrapment, *R v Loosely* (2001) is a landmark case.⁷⁹ Before going into these instructions, it should be noted that English criminal law saw a turn in how people viewed entrapment. This change was marked by the introduction of PACE 1984. In previous years, little weight was attached to a defence based on entrapment. Criminal liability was based on the question of whether the suspect had the intention of committing the offence. That the act might have been encouraged by police intervention was no reason for the dismissal or exclusion of evidence at the time. If, nonetheless, there was reason to sanction any unlawfulness found, the mitigation of the punishment sufficed. This change became clear in case law in *R v Loosely*, where the House of Lords answered the question of whether English case law was compatible with that of the ECtHR⁸⁰ and presented instructions on how to assess an entrapment defence in the light of the ECtHR’s case law. The main instruction is to check whether the relevant officer behaved like an ordinary member of the public and whether he or she acted in good faith.⁸¹ After all, police conduct must not be seriously improper so ‘as to bring the administrator of justice into disrepute’.⁸²

Police conduct, however, is never without context, but should be assessed in the light of the suspect’s profile. This is part of a second instruction: the question regarding the suspect’s predisposition. Would the suspect have been guilty of grooming without police intervention? And what indications are there to conclude this? This needs a listing of concrete facts and circumstances that give reason to suggest such a predisposition. If, for example, the suspect was at first

75 To determine whether there is a right to disclose an objective test is used, described as follows: ‘disclosure might reasonably be considered capable of undermining the case of the prosecutor against the accused, or of assisting the case for the accused.’ Attorney General’s Guidelines, Disclosure of information in criminal proceedings, *Blackstone’s Criminal Practice*, 2006, Appendix 6. Landmark case is: *R v H and C*, [2004] 2 WLR 335.

76 Brants & Ringnalda, supra note 62. Bearing in mind *Bannikova v Russia*, the issue is whether this procedural routing lives up to standards set out by the ECtHR, requiring transparent procedures, as well as sufficient guarantees regarding judicial control (ECtHR 4 November 2010, appl.no. 18757/06, Par. 54. Also see Par. 52, related to the absence of disclosure). In this context, reference may be made to the conclusion of Wolak et al., supra note 22 that in American criminal cases if the Public Prosecution Service has been involved at an early stage, the possibility of presenting an entrapment defence decreases.

77 Covert Surveillance, Code of Practice Section 1.8 explicitly refers to the connection between the lawfulness of the use of covert surveillance and Section 78 PACE 1984.

78 M. Zander, *The PACE 1984*, 2005. Choo and Mellors also refer to an instruction from 1986, Home Office, *Consolidated Circular to the Police and Kindred Matters* (Home Office Circular 35/1986). A. L.-T. Choo and M. Mellors, ‘Undercover police operations and what the suspect said (or didn’t say)’, 1995 *Web Journal of Current Legal Issues*, no. 2. The ECtHR has found the procedure as regulated in Section 78 PACE 1984 to be compatible with the ECHR: ECtHR 27 October 2004, appl.no. 39647/98 and 40461/98, Par. 46 (*Edwards & Louis v United Kingdom*)

79 *R v Loosely*, [2001] UKHL 53. For a discussion of the case law: Ashworth, supra note 64; Asworth & Redmayne, supra note 70.

80 By then, the implementation of the Human Rights Act 1984 had given the ECtHR’s case law direct effect in English criminal-law practice. The House of Lords believes that English case law with respect to entrapment includes no conflict with the basic principles as formulated by the ECtHR. Attorney-General’s Reference no. 3 of 2000, *R v Loosely*, [2001] UKHL 53, in 30.

81 D. Ormerod & A. Roberts, ‘The trouble with Teixeira: Developing a principled approach to entrapment’, 2002 *The International Journal of Evidence & Proof* 6, no. 1, p. 54.

82 Attorney General’s Reference no. 3 of 2000, *R v Loosely*, [2001] UKHL 53, in 23: ‘On this a useful guideline is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime (...). The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances.’

unresponsive with respect to the supposed child (the covert investigator) this is considered a counter-indication.⁸³ This also applies if it is established that the suspect's personal circumstances were exceptional at the time, making him more vulnerable to the covert investigator's invitations.⁸⁴ The opposite may also apply, however: suspects' personal profile may be reason to suspect them of having a certain predisposition towards committing sexual offences with children, e.g. because they have prior convictions for such offences.⁸⁵

It will be clear that the assessment of the lawfulness of police action must be considered in context with the casuistry of the criminal case, where the criminal court has a certain margin of discretion. It should be taken into account that entrapment is a so-called substantive defence. If this is allowed, it can result in the exclusion of evidence, making it impossible to deliver the evidence related to the offender's intention. The other way around, it is true that where the suspect is found to have a certain predisposition, this basically answers the question for evidence of intention.⁸⁶ For this reason, it is argued that predisposition should be assessed in a stricter manner, conditioning it on objective and specific facts and circumstances.⁸⁷

4.7. *Partial conclusion*

Does the above description shed a different light on the apparently successful investigation and litigation of grooming in English criminal-law practice? Without drawing a full conclusion, it can be stated that there is no unambiguous answer to this question. The gradual rise in the number of registered cases of grooming in England indicates a social problem of some size. And more: it may be assumed that the number of cases with successful litigation for grooming will be increasing in the coming years, now that the starting phase has been successfully completed.

From a qualitative perspective, however, some things can be said against the English criminal provision and the manner in which it is enforced in criminal-law practice. After all, it is based on a threat assessment of stranger danger, with the resulting wish for preventive action, which triggers proactive detection. It is true that Section 78 PACE 1984 provides for judicial control of irregularities in the process, but the autonomous manner in which the English police force apply and monitor these special investigation powers during the preliminary investigation entails a certain risk of an overly free interpretation. What is more, the tradition of plea bargain-

83 Similar points of reference can be found in American case law. For a discussion, see: Moore et al., supra note 61. In this context, reference can be made to *US v Jacobsson*, 503 US 540 (1992), where the suspect was approached periodically for several years by the American police with the offer to supply child pornography. The US Supreme Court judged that this created unacceptable pressure.

84 Cf. *US v Poehlman* 217 F 3d 692 (9th Cir. 2000), in which the female covert investigator exerted too much pressure on the suspect, a transsexual man who was in the middle of a relational crisis. Also see: ECtHR 4 November 2010, appl.no. 18757/06, Par. 37-38 and 47-48, respectively (*Bannikova v Russia*).

85 See in this context: ECtHR 7 September 2004, appl.no. 58753/00 (*Eurofinacom v France*). In this case, a website was infiltrated that offered prostitutes. The ECtHR believes that this involved no entrapment since the suspect's intention to act as an intermediary for prostitutes was evident.

86 Entrapment is therefore a substantive defence. Also see: D. Stevenson, *Entrapment by numbers*, Bepress Legal Series 2006, paper 1245, p. 70. This refers to entrapment as an 'affirmative defence'. For similar terms: Ross, supra note 66.

87 Ashworth, supra note 64; Ormerod & Roberts, supra note 81; Ashworth & Redmayne, supra note 70, p. 261, where they see a connection with the requirement of sufficient concrete facts and circumstances as set by the ECtHR in the lawfulness test of preventive detention based on Art. 5 ECHR. A similar debate took place, for that matter, in American criminal-law literature, triggered by the US Supreme Court's opinion that in the assessment of an entrapment defence, the basis must be a subjective approach (in *US v Sorells*, 287 US 435 at 454 (1932)). Opponents argue in favour of an objective approach, based on concrete facts and circumstances. Also: W. Sinnott-Armstrong, 'Entrapment in the Net?', 1999 *Ethics and Information Technology* 1, no. 2, pp. 95-104; J.S. Fulda, 'Internet stings directed at pedophiles: a study in philosophy and law', 2007 *Sexuality & Culture* 11, no. 1, pp. 52-98; Moore et al., supra note 61. Application of an objective approach is not ruled out, for that matter, as shown in *US v Jacobsson*, 503 US 540 (1992).

ing has inherent limitations with respect to the disclosure and scrutiny of evidence.⁸⁸ Moreover, the late point of external control (due to the English police force's autonomous position) makes such irregularities difficult to uncover⁸⁹ or makes them likely to be taken very lightly. Although no hard evidence has been found, the weight attached to the suspect's possible predisposition seems to cast its shadow on the assessment of possible unlawful police action.⁹⁰ Whether and to what extent the English 'success' can be explained by the autonomous position of the police as the leader of the investigation is impossible to say. But this line of reasoning seems relatively realistic.

5. Grooming: the Netherlands

5.1. Introduction

In the Netherlands, grooming has been a criminal offence since 1 July 2010.⁹¹ Article 248e Dutch Criminal Code (DCC) reads:

'Any person who by means of a computerised work or using a communication service suggests a meeting with a person about whom they know or should reasonably have suspected that they have not reached the age of sixteen, with the intention of committing indecent acts with that person or producing an image of a sexual act involving that person, shall be punishable by imprisonment for a maximum of two years or a fine of the fourth category if they take any action aimed at realising that meeting.'

The Dutch provision generally corresponds with the English one, although the legal methodology is different. Contrary to England, there were no controversial cases in the phase before grooming was made a criminal offence. There was, however, as in other countries, great concern about the consequences of increasing digitalisation and entailing options for the manipulation of children, making the political climate favourable to the expansion of decency legislation in favour of the protection of children. Within one year after the Convention became effective, grooming was made a criminal offence. A substantial difference with the English criminal provision is that Article 248e DCC only pertains to online grooming: it includes the requirement that a computerised work or communication service is used.⁹² On the one hand, this makes the scope of Article 248e DCC more limited than that of Section 15 SOA 2003. On the other hand, however, the wording of the Dutch provision being wider, the firm intention having to be deduced from one

88 Cape and Hodgson, *supra* note 58. However, according to the ECtHR a guilty plea does not absolve the trial court from the duty to examine allegations of incitement; ECtHR 12 May 2000, appl.no. 35394/97 (*Khan v The United Kingdom*) and ECtHR 5 February 2008, appl.no. 74420/01, Par. 72 (*Ramanauskas v Lithuania*). Furthermore: ECtHR 4 November 2010, appl.no. 18757/09, Par. 63 (*Bannikova v Russia*).

89 Ashworth and Redmayne mention the police having reservations concerning the granting of disclosure. Also, 'bookkeeping' of the evidence is said to be flawed. Ashworth & Redmayne, *supra* note 70, pp. 240-241.

90 Also: Zander, *supra* note 78, pp. 380-381. Zander emphasises the burden of proof concerning the defence and states that allowing this defence will only follow if the court is convinced: 1. that rules have been violated or there has otherwise been improper police conduct; 2. that it concerns a substantial unlawfulness; 3. that the quality of the criminal procedure has been negatively affected from the perspective of the defence, and 4. that the extent of the unlawfulness is such that the evidence must be excluded. Zander states: 'if this does not amount to the burden of proof being on the defence, it is remarkably close.'

91 The official Dutch text reads: '*Hij die door middel van een geautomatiseerd werk of met gebruikmaking van een communicatiedienst een persoon van wie hij weet of redelijkerwijs moet vermoeden dat deze de leeftijd van zestien jaar nog niet heeft bereikt, een ontmoeting voorstelt met het oogmerk ontuchtige handelingen met die persoon te plegen of een afbeelding van een seksuele gedraging waarbij die persoon is betrokken, te vervaardigen wordt, indien hij enige handeling onderneemt gericht op het verwezenlijken van die ontmoeting, gestraft met gevangenisstraf van ten hoogste twee jaren of geldboete van de vierde categorie*'.

92 This is related to the fact that offline grooming amounts to the criminal offence of seduction under Art. 248a DCC.

single act towards committing an offence only, the scope of Article 248e DCC exceeds that of Section 15 SOA 2003.

5.2. *The actus reus requirement*

Similar to the English requirement of ‘a persistent and continued course of conduct’, a clearly recognisable, externally visible wilful act must be involved.⁹³ The actual requirements for this act are unclear, since the legislator did not want to specify this in detail.⁹⁴ It is clear, however, that these requirements are not very strict. Taking into account that the firm intention can be deduced from one single act, it would be logical to expect that stricter requirements should apply to the act towards committing an offence, but that is not the case. The proposal to meet up, for example, does not need to be specified further in time and location. Nor is there a requirement for any earlier meeting or any form of digital contact of an indecent nature to have taken place (e.g. performing sexual acts by the offender or victim in front of a webcam). Based on the legislator’s non-exhaustive enumeration of acts towards committing an offence, it may concern apparently innocent actions. The list includes the suspect’s going to the agreed location, providing the victim with a route description to that location or buying train tickets or entry tickets in connection with the intended meeting. These acts in themselves seem to offer insufficient evidence for a firm intention to commit indecent acts. Additional evidence is required in the form of prior chats and e-mail communication or tapped telephone conversations. It must be established that there is in some way a causal connection between the digital communication, the subsequent creation of a dangerous situation and the suspect’s actions.

5.3. *The mens rea requirement*

As in the English provision, the emphasis is on how firm the intention is. Moreover, the intention must be aimed at committing an ‘indecent act’. This covers acts that go against social standards concerning sexual intercourse with children. The legal criterion is the average citizen; deviant opinions of the suspect are not relevant. Nor is it relevant whether the child agrees to the contact, or has taken the initiative. The English criminal provision includes a more neutral formulation: it requires the intention to be aimed at one of the offences as included in the SOA 2003. This difference in wording has no practical consequences: in both cases it concerns sexual acts that are unacceptable according to social standards. Nevertheless, problems are to be foreseen regarding evidence of the suspect’s intention. Article 248e DCC requiring a firm intention, the legislator did not provide for detailed instructions other than stating the need for an explicit, cognizable exercise of the perpetrator’s will.⁹⁵ Grooming activities being of an undistinguished nature, consisting of apparently innocent actions, evidence of the perpetrator’s firm intention will have to be provided by chat sessions, emails and/or telephone tapping, together with activities which show the perpetrator’s will to arrange a meeting with the intended victim, e.g. buying a train ticket or booking hotel accommodation.

Where the age requirement of the victim is concerned, there are no differences between the English and the Dutch criminal provision. Both require the suspect to have known or reasonably have suspected that the child was under sixteen at the time of the meeting. The question is what

93 *Kamerstukken II* (Dutch Parliamentary Papers) 2008/09, 31 810, no. 3, p. 7; *Kamerstukken II* (Dutch Parliamentary Papers) 2008/09, 31 810, no. 6, p. 7.

94 It should be emphasised that digital communication as such is not an offence. Nor is it in English criminal law.

95 *Kamerstukken II* (Dutch Parliamentary Papers) 2008/09, 31 810, no. 3, p. 7; *Kamerstukken II* (Dutch Parliamentary Papers) 2008/09, 31 810, no. 6, p. 7.

this reasonable suspicion must be based on. Can the offender rely on the age as given by the victim? Or is he obliged to put more effort into finding out the victim's real age?⁹⁶

Anticipating the enforcement issues to be described below, taking into account the legislator's clear decision to provide for an open-worded provision, a detailed instruction from the Public Prosecution Service would have been preferable. Instead, the Directive drawn up by the Dutch Prosecution Service is, at least in comparison to the English manual, of a rather general nature.⁹⁷ Thus the Dutch police and Public Prosecution Service are not clearly instructed on how to assess cases of suspected grooming. Borrowing from the manual used by the English police and Public Prosecutor, signs to be looked for would be the extent of planning, the stage of performance, the refinement of the grooming, the nature of the intended sexual contact (e.g. (non-)penetrative, age difference, use of force), the nature and amount of possible harm, as well as the reasons for not finalising the sexual contact.

5.4. Other elements: age requirements

On one point, there is a fundamental difference of opinion, and that is the punishability of grooming by children. Although the Convention includes no instructions to this end, the Dutch legislator has set no age limit for the offender. The English provision states that the offender's age must be eighteen or over. The Dutch legislator, however, wished to have instruments to act against sexual manipulation between children as well.⁹⁸ According to the Dutch legislator this would not detract from children's sexual autonomy, since the offence is required to include 'indecent acts'. Consensual acts between children would therefore be beyond the scope of Article 248e DCC.⁹⁹

5.5. Other elements: the additional condition for punishability

A final point of legal methodology is that in the Dutch criminal-law system, the act towards committing the offence is a so-called 'additional condition for punishability' (*'bijkomende voorwaarde van strafbaarheid'*). In other words: the act towards committing the offence establishes the punishability. It must be assumed that at the time of the act towards committing the offence, the situation involves a completed act of grooming. As of that moment, whether the suspect intends to rely on a change of view is irrelevant. Practically speaking, this will not result in a difference in punishability in the two legal systems. In both systems, it is up to the criminal court to decide whether the situation involved the required intention and act towards committing the offence.

Finally, as regards possible objections against making grooming a criminal offence: there were some, but only a few. This is remarkable, since making grooming a criminal offence as a specific preparatory act involves an expansion of the scope of criminal law, because it moves away from the starting point in the Dutch system that preparatory acts are only punishable for

96 Research regarding the efforts suspects undertake to obtain certainty regarding the age of the minors contacted show different outcomes. Australian research, carried out by Krone, divulges that only 50% of perpetrators (N=25) undertake substantial efforts, e.g. by making a telephone call to the minor, or requiring a photo. The majority of the cases described by Krone are of an escalating nature, aiming at short-term satisfaction; Krone, *supra* note 61. Describing the subsequent stages of grooming, both O'Connell, *supra* note 19, and Webster et al., *supra* note 17 distinguish a 'risk management stage'.

97 Dutch Board of Prosecutors-General, 'Directive Child Pornography', *Staatscourant* 2010, 19121, <www.om.nl/organisatie/beleidsregels/overzicht/zeden/@155181/aanwijzing/>.

98 *Kamerstukken II* (Dutch Parliamentary Papers) 2008/09, 31 810, no. 3, pp. 8-9. This may include taking sexual pictures using mobile telephones and subsequent blackmail, resulting in actual sexual contact.

99 An additional argument was that the Dutch Public Prosecution Service is obliged to ask under-age victims about their opinion regarding the planned criminal proceedings (Art. 167a DPCP). This serves to correct inappropriate proceedings as well.

serious offences that are punishable by eight years of imprisonment or more (Article 46 DCC).¹⁰⁰ However, these objections did not outweigh the existing political consensus that the intended criminalization was necessary to prevent sexual abuse.¹⁰¹

5.6. Penalties and measures

Following the lines as set out in the description of the English system, it must be pointed out that Dutch criminal law does not include a package of preventative measures specifically related to sexual offences, such as the SOPOs in SOA 2003. Dutch criminal law has similar conditions, but they apply to all offences in general and are included in the General Provisions in Book 1 of the Dutch Criminal Code.

Article 14a DCC mentions the legal conditions for suspended sentences, being: financial compensation of damage, intramural treatment, paying a sum of money to a public fund, taking care of the victim's interest, or other conditions regarding the course of the perpetrator's behaviour, including the undergoing of ambulant treatment.

The contents of these suggested conditions are somewhat similar to the English SOPOs, although the latter are more comprehensive. A legislative proposal has been submitted that seeks to expand this package of conditions.¹⁰² For the sake of completeness, it needs to be stated that Dutch law includes no preventative measures specifically applicable to sexual offences such as the English RSHO.

5.7. Enforcement

As indicated in the introduction, nothing much can be said as yet about the enforcement of the criminalization of grooming in Dutch criminal-law practice. It is still impossible to answer the question of whether grooming is a frequent offence. Until May 2011, as far as is known, proceedings had been instituted for grooming in three cases, where the judgment included a conviction.¹⁰³ In all three cases actual sexual abuse followed the initial grooming, which means that the preventive objectives of Article 248e DCC were not achieved. It can be established, however, that the legislator failed to make a thorough prior analysis of the phenomenon of grooming and of possible problems regarding the enforcement of the criminal provision.¹⁰⁴ To be specific, the legislative proposal and the parliamentary debate only included a few phrases about the question regarding the use of special investigation methods and related problems. Nothing was said about possible violations of privacy or risks of entrapment. All that was said was that the use of special investigative means should not be restricted in advance by opting for a limited number of powers.¹⁰⁵ It seems that at the time, the legislator was confident that the

100 This objection was countered by referring to other exceptions. *Kamerstukken II* (Dutch Parliamentary Papers) 2008/09, 31 810, no. 7, p. 8. It should be noted that at the time that punishable preparation (*strafbare voorbereiding*) was introduced as an offence in 1992, the possibility was left open for the preparation of lesser offences to be made a criminal offence as well. *Kamerstukken II* (Dutch Parliamentary Papers) 1990/91, 22 268, no. 3, p. 5.

101 *Kamerstukken II* (Dutch Parliamentary Papers) 2008/09, 31 810, no. 3, p. 9 (Explanatory Memorandum).

102 *Kamerstukken II* (Dutch Parliamentary Papers) 2009/10, 32 319, nos. 1-3 (Amendment of the Dutch Criminal Code following amendments in the regulations regarding suspended sentences and the regulations regarding parole; *Wijziging van het Wetboek van Strafrecht in verband met wijzigingen van de regeling van de voorwaardelijke veroordeling en de regeling van de voorwaardelijke invrijheidstelling*).

103 District Court (*Rechtbank*) of Middelburg 3 November 2010, *LJN* BO2782; District Court (*Rechtbank*) of Utrecht 9 February 2011, *LJN* BP3760; District Court (*Rechtbank*) of Zwolle 5 April 2011, *LJN* BQ0202, <www.rechtspraak.nl>.

104 Kool, supra note 9.

105 *Kamerstukken II* (Dutch Parliamentary Papers) 2008/09, 31 810, no. 3, p. 10 (Explanatory Memorandum).

Dutch criminal-law practice would find its own way to go about the detection of grooming. This impression was confirmed by information later received from the police.¹⁰⁶

Combined with the open wording of the criminal provision, this has resulted in the Dutch police and the Public Prosecution Service now being faced with the task of discerning the limits of proactive investigation and punishability.¹⁰⁷ It is likely that, as is done elsewhere, decoy profiles will be used and decoy websites as well, but to a lesser extent. It is foreseeable that this will give rise to the same questions as the ones described in English criminal-law practice, i.e. the question regarding possible violations of privacy and the likelihood of entrapment. Research shows that Dutch authorities only make limited use of undercover operations, due to the high risk of violations of privacy.¹⁰⁸

Following the same reasoning, it is also true for the Dutch situation that in the preliminary stage establishing digital contacts needs no specific legal basis. After all, the suspect who logs onto a public site loses his right to privacy, or at least has a reduced right. The fundamentally open character of the Internet, combined with the fact that the police publicly announce their proactive Internet activities, entails that the general power to investigate offences as included in Article 141 and 142 of the Dutch Code of Criminal Procedure (DCCP) and Article 2 Police Act (*Politiewet*) is sufficient.¹⁰⁹ From the moment that the communication is continued on a non-public site, the requirement of explicit legal authority applies. This authority is provided in Book I, Title IVa DCCP, which formulates the special investigation powers. The starting point in Dutch criminal procedure is that these more radical powers can only be applied to more serious offences, including serious offences for which pre-trial detention would be allowed. This generally concerns offences punishable by four years of imprisonment or more. This would not include grooming, in view of the lower maximum penalty (two years' imprisonment). The legislator solved this problem by including Article 248e DCC in the category of offences for which pre-trial detention is allowed by way of exception (Article 67 Paragraph 1 Sub. b DCCP). This means that special investigation powers can be used to detect grooming.

In the use of these powers, there are clear differences between the English and Dutch legal cultures. The continental tradition, to which the Netherlands belongs, has a strictly hierarchical relationship between the police (where their criminal-law duties are concerned) and the Public Prosecution Service. It is true that the police carry out the greater part of the investigation, but they do so under the supervision and responsibility of the Public Prosecution Service. If the use of proactive powers is required, this must be done by order of the public prosecutor, a copy of which must be included in the criminal file (disclosure). This is an initial constitutional test of the investigation and the special investigation powers to be used.

106 This is based on a telephone conversation and a personal meeting with an investigation officer of the High-Tech Crime Team of the National Police Services Agency (*Korps Landelijke Politie Diensten; KLPD*). Also see: Webster et al., *supra* note 6, according to them police officers from across Europe unanimously agree upon the view that little is currently known about the process of online grooming.

107 By way of an example: it is not allowed for a covert investigator, when asked about the age of the child he/she is pretending to be, to lie about his/her age. This means that a sufficient but different answer will have to be formulated.

108 E. Kruisberg & D. de Jong, 'Undercovermethoden na de Wet BOB', 2010 *Nederlands Juristenblad*, pp. 341-347. The police officer interviewed for this article confirmed that the Dutch Public Prosecution Service is cautious regarding the use of proactive investigation methods, especially infiltration.

109 G.J.M. Corstens, *Het Nederlands strafprocesrecht*, 2008, Paras. 4.14-4.17. Also see the Explanatory Memorandum to the Dutch Special Methods of Investigation Act (*Wet Bijzondere Opsporingsbevoegdheden*); *Kamerstukken II* (Dutch Parliamentary Papers) 1996/97, 25 403, no. 3, pp. 30-34. Participation in online newsgroups is not qualified as interrogation with the related obligation to caution. In Dutch criminal-law dogmatics, there is a difference of opinion regarding the scope of the right to privacy and the related question regarding the necessity of specific legal investigation powers. Knigge and Kwakman in particular have stricter requirements than those assumed in this article. In this context, Knigge and Kwakman mention the 'expanding right' nature (*'groeirecht-karakter'*) of the right to privacy, referring to the fact that it is impossible to make a sharp distinction regarding the question of whether government interference falls or does not fall within the scope of a constitutional right. Also see: Knigge & Kwakman, *supra* note 65, Par. 6.1.2.2.

Although the option of using special investigation powers is provided, it is not yet clear which powers are concerned in the investigation of grooming. As previously noted, the legislator did not wish to exclude any of the special investigation powers. It seems obvious that it would involve infiltration (Article 126h DCCP) and/or the systematic gathering of information (Article 126j DCCP).¹¹⁰ Deception and establishing confidential contact with the suspect are allowed in both cases.

This is where the insufficient prior analysis of how to make grooming a criminal offence and the ensuing problems of enforcement proves to cause some problems. Both provisions include conditions that cannot be satisfied in the proactive detection of grooming, because they both state that a suspicion of a serious offence must be involved. This condition is not satisfied if decoy profiles are used for infiltration or if information is systematically gathered.¹¹¹ This problem does not occur if a report has been made, since this constitutes reasonable suspicion.

Infiltration involves a second problem, because it requires a ‘group of persons’. This condition does not seem to be met for the infiltration of a website. With respect to such a website a suspicion may exist that it attracts active groomers, but this suspicion applies to individuals and not to a group. It may possibly be true that there is a suspicion that the relevant website is used to commit group offences, in particular the exchange of child pornographic material. The question then is whether this group-related suspicion can be used to detect other offences.

Should the provision on infiltration apply, there is the question of possible entrapment. Article 126j Paragraph 2 DCCP includes a prohibition of entrapment.¹¹² The question whether entrapment is involved is answered based on the same aspects as those that are formulated for English criminal law: it must be established whether the situation concerned the suspect’s intention aimed at committing an offence prior to police intervention.¹¹³ Police action will be assessed on this basis, where in particular the nature and intensity of the action is taken into account.¹¹⁴

It must be noted that the wording of the age requirement causes problems of evidence if decoy profiles are used. The age criterion not being objectified, it must be proven that the perpetrator did not reasonably believe the (alleged) minor to be sixteen at the time of the meeting. The use of decoy profiles, however, involves fictitious personal details. How should one, in such a case, assess the defence that the intended victim was not a child about whom the offender knew or reasonably should have known that he/she had not reached the age of sixteen in these cases? After all, there is no child involved. The only thing resulting from this is a non-punishable, absolutely defective preparatory act. This could have been solved by including the words

110 These powers can also be used in the event of a suspicion of organised crime or of the preparation of organised crime. Although these offences cannot be ruled out, grooming seems to be limited to individual offenders for now. For this reason, these provisions are assumed to be applicable. There is a third option: that it would involve the undercover purchase or the undercover provision of services under Art. 126i DCCP. This assumes that establishing digital contacts is considered as a ‘purchase’ or a ‘provision of services’. For the moment, this assumption is rejected as being too far from the original meaning of this provision.

111 With regard to the relevant website there may be a suspicion that the participants are involved in the production, distribution etc. of child pornography. This suspicion, however, is an insufficient basis for the specific proactive detection of a different offence, i.e. grooming.

112 This rule is based on the *Tallon* ruling. HR 4 December 1979, NJ 1980, 256 (HR: *Hoge Raad* = Dutch Supreme Court). Also for the ECtHR: ECtHR 9 June 1998, appl.no 44/1997/828/1034 (*Teixeira de Castro v Portugal*), ECtHR 2 October 2006, appl.no. 59696/00 (*Kudhobin v Russia*) and ECtHR 7 September 2004, appl.no. 58753/00 (*Eurofinacom v France*) and ECtHR 4 November 2010, appl.no. 18757/06 (*Bannikova v Russia*).

113 W.H. Jebbink, ‘Beoordeling van pseudokoop kan evenwichtiger’, 2007 *Nederlands Juristenblad*, no. 20. Jebbink believes that in Dutch case law, the emphasis on the predisposition (the subjective element) is too strong and believes that the focus should be on the question of who took the initiative for the contact and how the contact developed (the objective element).

114 See the conclusion of Advocate General Jörg for HR 16 April 1999, NJ 2000, 739.

‘apparent child involved’ in Article 248e DCC (*‘schijnbaar betrokken minderjarige’*).¹¹⁵ Given the absence of a concrete danger, however, the introduction of such a formula is controversial.

If there is a suspicion of entrapment, or of any other unlawfulness in police action, this can be submitted to the court. Article 359a DCCP includes the power to sanction these cases by barring the prosecution, excluding evidence or reducing the sentence. This last sanction, not available in English criminal law, is preferred.¹¹⁶

The above description shows that a legal framework does exist as a basis for enforcement, but that the powers and conditions with respect to this enforcement are unclear. It has been observed that the legislator has presented an open task. The police and the Public Prosecution Service will have to find out how to successfully combat grooming. The problem is that their means are too limited.¹¹⁷ For this reason, they are now only working on a preliminary analysis, concentrated at the level of the National Police Services Agency (*Korps Landelijke Politiediensten; KLPD*).¹¹⁸ As a pilot case, a gay website was infiltrated, which has led to the arrest of a suspect whose criminal case is now being prepared.

5.8. Partial conclusion

In line with the Convention the Dutch legislator has provided for a penal provision, providing an instrument to combat online grooming. However, overlooking the open nature of Article 248e DCC, problems regarding enforcement are foreseeable. Naturally, in this type of exploration, the Public Prosecution Service has a very strong hierarchical responsibility and permanent coordination between the police and the Public Prosecution Service is necessary. It is as yet impossible to say whether this aspect, which is characteristic of the Dutch criminal-law system, will hinder effective detection. This is not expected to be the case in the long term. It is true that in the Netherlands enforcement will follow a slightly different route than it does in England, but in both countries the procedure must comply with the requirements of lawful investigation. In addition, convergence is ensured by the ECtHR’s criteria and also by the instructions from the Council of Europe and of the European Union.¹¹⁹ Looking at it from this perspective, the cultural differences between the Dutch and English criminal-law systems, especially concerning the responsibility for detection and the related degree of police autonomy, do not seem to be too great.

6. Conclusion: precautionary criminal law?

This article has addressed the problems of grooming, the obligation to make it an offence as formulated at the European level and the manner in which the Netherlands has complied with this obligation, assessing it based on the English criminal-law practice which has worked with grooming being a criminal offence for some time. With a view to a possible influence of differences in legal culture a comparison has been made with the situation in the Netherlands,

115 Reference may be made to the criminalization of possession etc. of child pornography (Art. 240b DCC). This means that proceedings can be based on possession etc. of virtual pictures, but not of actual pictures.

116 HR 30 March 2004, *NJ* 2004, 376. Corstens, *supra* note 109, Par. 8.12.

117 Although the capacity of the Dutch police force’s vice teams has recently been expanded as part of the Improvement Programme for Combating Child Pornography (*Verbeterprogramma bestrijding Kinderpornografie*; see *Kamerstukken II* (Dutch Parliamentary Papers) 2009/10, 32 213, no. 79), the teams are still understaffed. The High-Tech Crime Team of the National Police Services Agency (KLPD) currently has nine employees, two of whom work on the detection of grooming. To safeguard the progress of the investigation, however, two investigators are assigned to each case, which means that only one case is actually conducted.

118 One of the reasons to have the National Police Services Agency (KLPD) conduct these investigations is that it is difficult to determine which police region should cover a suspect operating on the Internet.

119 In addition, international cooperation makes coordination necessary. This is currently done at the level of the above-mentioned Virtual Global Task Force.

resulting in the conclusion that both on the level of substantive law and on that of procedural law similar problems may arise. No answer has been found to the main question: to what extent does making grooming a criminal offence, or aiming to do so, constitute precautionary criminal law, and what conclusions may be drawn from this? It has been noted that if the sexual abuse of children is concerned there is a certain natural tendency to take precautionary measures, to be translated into the application of criminal law. Therefore the European wish to make grooming a criminal offence is not met with surprise. After all, apart from the question about the practical effects, there is a political need to set public standards.

However, for grooming the problem is that it concerns the preventive fight against sexual abuse. It is true that traditionally prevention has been a major objective in criminal law, but under pressure from increasing social insecurity and the resulting need for safety, prevention has acquired a more or less independent and ‘absolute’ meaning. Prevention has started to outshine the other objectives of criminal law and criminal procedure, causing less attention to be paid to the other objectives, in particular individual legal protection. Traditional requirements of restraint and legal certainty have lost their meaning, and open wording in criminal provisions and shifts toward the front of criminal law and criminal procedure are almost considered normal. They are, after all, a necessary ‘evil’ to create public safety. Not only is this a very high price to pay, it is also likely that it will not yield the desired results. In the end, making grooming a criminal offence, in spite of the apparently wonderful English results, only produces false security. Bearing in mind the open nature of the penal provisions, the criminal justice authorities are expected to provide a clear demarcation of online grooming. Overlooking the everyday nature of activities constituting online grooming, this is not an easy job. Moreover, even if, as is to be expected, the judiciary will succeed in ‘fine tuning’ the penal provisions (Section 15 SOA 2003 and Article 248e DCC), adequate protection will be hampered by limited police capacity, as well as inadequate competences. The most important issue, however, is to realise that the actual danger of sexual abuse is being in the inner circle and not in the outer circle (‘stranger danger’). Combating online grooming by the use of the criminal justice system is doomed to have only relative value.

At the same time it is true that the use of criminal law is ‘inevitable’ here. In view of the importance of the interests to be protected, criminal law needs to play a role in combating sexual abuse, and therefore in the fight against grooming as well. Using criminal legislation as a means to express public standards (symbolic legislation) is not necessarily illegitimate. Nor does an expansion of criminal-law powers need to cause any problems; adapting the tools of criminal procedure may be necessary in view of the changing nature of crime (cybercrime).

What should be avoided, however, is that at the public level insufficient account is taken of the inherent limitations of criminal-law tools. Both the European level and the national level (England and the Netherlands) have failed to make a sufficient prior analysis of the criminalization of grooming and the related problems of enforcement. Due to this, the criminalization of grooming is not just based on the moral quicksand of the fear of ‘stranger danger’, it also includes overestimating the options of criminal law, creating a breeding ground for social discontent. The legislator has made society a ‘precautionary promise’ for protection that can only partially be fulfilled. This means that criminal law will permanently need to be wary of the promises of perfectibility that are implied in precautionary thinking.¹²⁰

120 W.-J. Kortleven, ‘Over voorzorg, radicale preventie en de grenzen van de maakbaarheid: Een beschouwing naar aanleiding van het WRR-rapport Onzekere veiligheid’, in M. Hildebrand & R. Pieterman, *Zorg om voorzorg*, 2010, pp. 161-178. Kortleven points out that the trend to focus on uncertain risks may result in a ‘radicalisation of the perfectibility perspective’ (*‘radicalisering van het maakbaarheids perspectief’*;

Par. 8.4). Also see Lippens, *supra* note 5, p. 230. Lippens recognises a structural gap here and refers to a ‘post-material lack of interest in constructive communication and democratic debate’ that is rooted in deeper grounds (*‘post-materiële desinteresse in constructieve communicatie en democratisch debat’*).