

The government's announcement of a new offence which criminalises the sending of sexual messages to children by adults focuses on a very narrow perceived loophole in the existing legislation surrounding child sexual abuse.

The prime minister, David Cameron, has cited the "increasing and alarming phenomenon" of paedophiles contacting children online or by text message with requests to take and send nude photos. The implication is that this is not already sufficiently clearly defined as criminal behaviour.

The announcement raises many questions: what is the government looking to criminalise: all sexual communication with children? Or specifically messages where the adult is soliciting sexual images? How does existing legislation fail to regulate this activity – and how widely or narrowly should the offence be defined? The danger is that, if poorly written, the law will criminalise the behaviour of teenagers and young people – those the law aims to protect.

Closing a loophole

Existing offences under the Sexual Offences Act 2003 (SOA 2003) already tackle preparatory acts, but they are tightly formulated. Section 15 of the Act, often erroneously referred to as the "grooming offence", actually prohibits "meeting a child following sexual grooming". The offence requires communication with a child on at least two occasions, where the offender then meets or travels to meet the child with the intention of committing a sexual offence. The sexual offence itself does not have to take place.

In the same Act, offences under Sections 8 and 10 cover inciting or causing a child to engage in sexual activity – perhaps closer to what we would typically think of as grooming.

Essentially it is an offence to encourage a child to do something sexual – this could include removing their clothing – and by including incitement, the offence occurs whether or not the activity encouraged (say, undressing or taking a photo) actually takes place.

Also relevant is the Criminal Justice Act 1988, which makes the possession of child abuse images illegal. Here, possession includes where it is known that you have – or have had – the photograph in your possession. But under these laws the photograph has to exist. This is the loophole the new offence of sending of sexual messages to children seems set to plug.

In search of definitions

Perhaps the most realistic model offence is defined under Section 127 of the Communications Act 2003 as it assumes the activity will be centred on communications based on online or mobile phone technology. Here, the offence is committed by sending a message over a public electronic communications that is deemed "grossly offensive" or of an "indecent, obscene or menacing character".

This is not a sexual offence per se and there are problems with definitions, we can assume asking a child to remove their clothes would be declared indecent. And here, the offence occurs regardless of whether the message was received or not. This is a point that will need to be considered when drawing up the new offence, particularly as it seems they are interested in targeting adults who are fishing for victims online.

Unnecessary criminalisation

There are other questions: for example, who will be defined as a “child” for the purposes of this offence? For sections 15 and 10 of the the Sexual Offences Act a child is someone under 16 years old, but for offences relating to child abuse images, a child is defined as being younger than 18. Equally important is the definition of adult: the same Act defines adults as being over 18, while there is no such age restriction for offences dealing with child abuse image.

The concern, something already raised, is that the criminalisation of children for “sexting”, where young people have sent partially clothed images of themselves to their peers.

Who will judge what is and is not a “sexual message”? The Sexual Offences Act Section 15 neatly sidesteps this question by stating that the communication with the child need not be sexual – the crux of the offence is the intention of the offender to meet the child. Will “sexual” be objectively assessed, or will the sender’s motivations be paramount?

Although the protection of children is always a laudable aim, we need to be very cautious in how this offence is developed. It has the potential to be so broad as to include sexual chat between teenagers, needlessly criminalising growing young adults, and so narrow as to add nothing that isn’t already covered by existing legislation.