



#12 Sexting

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**This guide will provide an overview of ‘sexting’
and will explain how to defend a child who has
an allegation of sexting made against them.**

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Introduction

Sexting, also described as ‘youth-produced sexual imagery’, is the ‘exchange of sexual messages or images’ and the ‘creating, sharing and forwarding of sexually suggestive nude or nearly nude images through mobile phones and the internet’. In practice, teenagers are using a wide range of messaging services, email and social media apps to send ‘sexts’.

In 2016, NSPCC research revealed that 1 in 6 suspects reported to the police for sexual images were under 18-year-olds.¹ In 2019 the Guardian² reported that, over the three-year period reviewed, more than 6,000 children under 14 had been investigated by police for sexting, including some children as young as four who were classified as ‘suspects’ on the police database despite being well below the age of criminal responsibility.

- 1 National Society for the Prevention of Cruelty to Children (NSPCC) report, September 2016
- 2 Josh Halliday, ‘Thousands of children under 14 have been investigated by police for sexting. Critics say children are being given police records for behaviour they do not fully understand’, 30 December 2019, bit.ly/3fNCjw0

How are children being criminalised?

Children are often entirely unaware that they might be committing a criminal offence,³ for example:

- a person under the age of 18 creates and shares sexual imagery of themselves with a peer under the age of 18
- a person under the age of 18 shares sexual imagery created by another person under the age of 18 with a peer under the age of 18 or an adult
- a person under the age of 18 is in possession of sexual imagery created by another person under the age of 18.

The fact that the sender or recipient is also younger than 18 does not affect the legal position. Children are unwittingly potentially committing criminal offences by sharing naked images of themselves and others on phone apps and social media – and even by simply having those images of themselves on their own phone.

Often the circumstances in which the sexting takes place highlights the anomalies in the criminal law. Sixteen- and 17-year-olds will be commit-

ting an offence if they sext each other, but not if they actually have sexual intercourse.⁴ Younger children may also experiment with sexting in a developmentally appropriate way as part of normal sexually explorative behaviour.

At the other end of the scale is coercive or non-consensual sexting between children that is linked to cyber bullying and sexual violence. However, the criminalisation of children accused of these offences has also been criticised. The National Institute for Health and Care Excellence (NICE) has produced a report on harmful sexual behaviour among children and young people, highlighting the fact that inappropriate sexualised behaviour, which can include sexting, is often an expression of problems or underlying vulnerabilities.⁵ Many children's display of harmful sexual behaviour will naturally come to an end as they mature. Labelling children as sex offenders and subjecting them to stigmatising and intrusive interventions may actually prove counterproductive.

3 s1(1) Protection of Children Act 1978: taking, making, distributing, possessing with intent to distribute indecent images of children; s160(1) Criminal Justice Act 1988: possession of an indecent photograph of a child

4 16- and 17-year-olds who are married or living together in an enduring relationship may have a defence to sexting offences

5 'Harmful sexual behaviour among children and young people', NICE guideline [NG55], 20 September 2016, bit.ly/3TnYdmX

Offences

s1(1) Protection of Children Act (PCA) 1978 – taking, making, distributing, possessing with intent to distribute indecent images of children

'1 Indecent photographs of children

- (1) Subject to sections 1A and 1B, it is an offence for a person–
 - (a) to take, or permit to be taken, or to make, any indecent photograph or pseudo-photograph of a child; or
 - (b) to distribute or show such indecent photographs or pseudo-photographs; or
 - (c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or
 - (d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so.
- (2) For purposes of this Act, a person is to be regarded as distributing an indecent photograph or pseudo-photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person.'

Maximum sentence: 10 years' imprisonment

Interpretation

What constitutes 'indecent' is an issue for the tribunal of fact to decide. The tribunal must objectively apply recognised standards of decency.⁶ The circumstances and motivation of the taker are not relevant to whether the photograph is indecent.⁷

A 'child' is a person under 18.⁸ A person is taken to have been a child at any material time 'if it appears from the evidence as a whole that he was then under the age of 18'.⁹

'Make' means 'to cause to exist; to produce by action, to bring about'.¹⁰ The definition includes:

- downloading an image onto a disc or printing it from a computer¹¹
- opening an attachment to an email or app containing an image¹²
- downloading an image from a website onto a computer screen¹³

- accessing a website in which images appeared by way of automatic 'pop-up' mechanism.¹⁴

The act of making or taking the indecent photograph or pseudo-photograph must be a deliberate and intentional act, done with the knowledge that the image made is, or is likely to be, an indecent photograph or pseudo-photograph of a child. Likewise, for permitting an indecent photograph of a child to be taken, it must be proved that the defendant knew that such a photograph was being taken.

A person is to be regarded as distributing an indecent photograph or pseudo-photograph if the person parts with possession of it to, or exposes or offers it for acquisition by, another person.¹⁵

6 R v Stamford [1972] 56 Cr App R 398

7 R v Graham-Kerr [1988] Cr App R 302, CA, R v Neal [2011] EWCA Crim 461

8 s7(6) PCA 1978

9 s2(3) PCA 1978; s160(4) Criminal Justice Act 2003

10 R v Bowden [2000] 1 Cr App R 438

11 R v Bowden [2000] 1 Cr App R 438

12 R v Smith [2002] 1 Cr App R 13

13 R v Jayson [2002] 1 Cr App R 13

14 R v Harrison [2008] 1 Cr App R 29

15 s1(2) PCA 1978

Defences

The following are defences for the charge of sexting:

- Legitimate reason / lack of awareness: s1(4) PCA 1978 states:
 - (4) Where a person is charged with an offence under subsection (1)(b) or (c), it shall be a defence for him to prove–
 - (a) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in his possession; or
 - (b) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect, them to be indecent.

- Marriage and other relationships: This applies where the accused person and the child whom the image is of are 16 or over and married or living together in an enduring relationship.¹⁶
- Criminal investigations: This defence is available where the person ‘making’ an indecent image can prove it was necessary for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings.¹⁷

s160(1) Criminal Justice Act 1988 – possession of an indecent photograph of a child

‘Subject to section 160A it is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession.’

Maximum sentence: 5 years’ imprisonment

Interpretation

The person must knowingly have custody and control of the images. In cases where the images have been deleted, it will be necessary to show the person knew how to retrieve them. For

example, the person was aware deleted images had been cached, or was able to retrieve deleted images.

s160(2) Criminal Justice Act 1988

‘Where a person is charged with an offence under subsection [160](1), it shall be a defence for him to prove–

- (a) that he had a legitimate reason for having the photograph or pseudo-photograph in his possession; or
- (b) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent; or
- (c) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.’

The marriage and criminal investigation defences (above) are also available.

¹⁶ s1A PCA 1978

¹⁷ s1B PCA 1978

Police approach

The College of Policing recognise that in most cases of youth-produced sexual imagery where there are no aggravating features the appropriate response is to avoid a criminal justice outcome so that children will not be stigmatised.¹⁸

However the police will still create a crime record of any incident of sexting reported to them, under the Home Office counting rules (HOCR) for recorded crime.¹⁹

Sexting and schools

Schools have discretion as to whether to involve the police once they become aware that pupils have been involved in sexting. In some instances, police forces are encouraging schools to deal with sexting as a disciplinary matter where no aggravating features are present.²⁰ The UK Council for Internet Safety has issued guidance for schools, including when they should report to the police.²¹

One of the biggest issues raised by sexting is that once a school notifies the police, all reported offences of sexting must be recorded as a crime in line with the HOCR.²² Children may therefore have a sexting allegation indelibly recorded as a criminal offence on the Police National Database (PND).

18 'Briefing note: Police action in response to youth produced sexual imagery ("sexting")', College of Policing, 2016, p2, bit.ly/3UrYbMf

19 bit.ly/3G8jwGf

20 G Hales, 'A "sexting" surge or a conceptual muddle? The challenges of analogue law and ambiguous crime recording', The Police Foundation, 2018, pp3–4, bit.ly/3G8jtu3. See also: 'Child Centred Policing: When to call the police – Guidance for schools & colleges', National Police Chiefs' Council (NPCC), bit.ly/3ULV7KE; and guidance from the Department for Education, 'Keeping children safe in education', September 2022, bit.ly/3TsajM1; and 'Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children', July 2018, bit.ly/3hxgykg

21 'Sharing nudes and semi-nudes: how to respond to an incident (overview)', Department for Digital, Culture, Media and Sport and UK Council for Internet Safety, December 2020, bit.ly/3tkfBOW

22 Home Office Counting Rules for Recorded Crime, Annex B – Crime Recording (Schools Protocol), bit.ly/3G8jwGf

Victims of grooming

Children who commit sexting offences may themselves have been the victim of a predatory adult or older person who has coerced them to create indecent images of themselves or others. In these situations, they should be considered a victim rather than a suspect.

Sex offender register, notification requirements and barred list

Part 2 of the Sexual Offences Act (SOA) 2003 requires those convicted or cautioned of certain sexual offences to notify the police of certain personal details. The police keep this information on the Violent and Sex Offender Register (VISOR) – commonly known as the ‘sex offender register’.

When a child is convicted of one of the sexting offences described above, the notification requirements are only triggered if the child receives a sentence of imprisonment of 12 months or more.²³ The relevant age is that of the child on the date of the offence.²⁴ The term ‘sentence of imprisonment’ includes detention and training orders (DTOs) and ss90 and 91 Powers of Criminal Courts

(Sentencing) Act 2000 on detention.²⁵ In relation to a DTO, ‘term of imprisonment’ has been held to mean the length of the period served in custody.²⁶

A caution or conviction for these offences may result in the child being placed on the automatic barred list, which prevents them from working with children or vulnerable adults – although there is a right to make representations in respect of these offences (‘autobar with representations’).²⁷ If a child is notified that they are being considered for the barred list in respect of a caution or conviction for a sexting offence, they should seek legal advice.

23 Sch 3 paras 13 and 15 SOA 2003

24 Sch 3 para 95 SOA 2003

25 s131 SOA 2003

26 R v Slocombe [2005] EWCA Crim 2997

27 regs 4(5) and 6 and Sch 1 para 2(e) Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 SI 2009/37. The Disclosure and Barring Service (DBS) can only consider a person for inclusion on a barred list where that person is, has been, or might in the future be working with vulnerable groups in ‘regulated activity’ as defined by Sch 4 Safeguarding Vulnerable Groups Act 2006

28 ‘Police recorded crime and outcomes: open data tables user guide’, Home Office, October 2016, at p11, bit.ly/3WRg6Og

29 G Hales, ‘A “sexting” surge or a conceptual muddle? The challenges of analogue law and ambiguous crime recording’, The Police Foundation, 2018,

Criminal records

Youth cautions for sexting offences are spent automatically upon administration, youth conditional cautions are spent once the conditions are completed, usually after three months. They will not be disclosed on any basic or standard Disclosure and Barring Service (DBS) check. They will not automatically be disclosed on an enhanced DBS check, although there is discretion by the reviewing chief constable to disclose any information on the Police National Computer (PNC) where it is deemed relevant. Although if this occurs, this may be challengeable in the light of Lord Sumption's judgment in *R (P, G and W) v SSHD [2019] UKSC 3*.

Convictions for sexting offences will always be disclosed on a standard or enhanced DBS check and are never filtered.

Many incidents of sexting which come to the attention of the police are dealt with informally. It is generally only in serious cases with 'aggravating features' that they may issue a youth caution, or charge a child with an offence. The police often take 'no further action' (NFA) in respect of the incident. When they do so, they will note an Outcome Code, to indicate the reason for not pursuing the matter further, which may be due to insufficient evidence, or that it is not in the public interest to proceed. There are currently 22 outcome codes.

'Outcome 21' was introduced over a concern that too many children were being inadvertently criminalised for sexting.²⁸

Outcome 21 is an outcome code launched by the Home Office in 2016 as an option for recording the conclusion of a police investigation.. It states:

'Further investigation, resulting from the crime report, which could provide evidence sufficient to support formal action being taken against the suspect, is not in the public interest – police decision.'

All such crime records – often described as 'police intelligence' – are considered for disclosure on enhanced criminal record checks (but not standard checks). The discretion whether to disclose non-conviction information / police intelligence rests with the chief constable managing the process, and they will base this decision on whether they consider the information to be relevant. The purpose of recording certain crimes as Outcome 21 was to indicate to the disclosure officer that it is unlikely to be relevant to disclose such crimes in a criminal records check, although it provides no guarantee that it will not later be disclosed. The vast majority of police intelligence is not disclosed on enhanced criminal record checks, and in cases where the disclosure officers do decide to disclose it there is an appeal process.

The National Crime Recording Standard (NCRS) guides police forces on when to record crimes, and the HOCR clarify how to record them. There is nothing in either which says that the police must record anyone's personal details in the suspect or complainant / victim fields of a crime record for a crime to be recorded and counted. As a result, the details could be recorded elsewhere in the crime record.²⁹ There is an argument that personal details could be excluded from the record altogether, which would therefore prevent future disclosure of the information about that individual.

Practical tips

Where the police have taken no further action and/or recorded Outcome 21, ask for the child's name to be removed from the 'suspect' fields of the crime record.

Ensure that in cases where the child is a victim of grooming, or otherwise not culpable, that no crime record is created where they are listed as a suspect of a criminal offence. This can be done by liaising with the police, and if in doubt, making a subject access request to ascertain what has been recorded and how.

Be alert to a child who turns 18 during the process, as whilst a youth caution is immediately filtered, a caution administered as an adult (even for an offence committed as a child) will never be filtered and will appear on every standard and enhanced criminal record check for the rest of that person's life.

When considering the defences listed above, consider whether there might be arguments that could be made in relation to a child offender.

If the police are considering prosecuting a child for 'sexting', consider making written representations to the police or the Crown Prosecution Service (CPS) that there is a public interest argument against any formal action being taken against their client. There is considerable guidance for police and the CPS to support a different and individualised approach when children commit sexting offences as opposed to adults.

The representations will need to refer to the following guidance:

- 'Briefing note: Police action in response to youth produced sexual imagery ("sexting")', College of Policing, 2016³⁰
- 'Youth out-of-court disposals: Guide for police and youth offending services', Ministry of Justice and Youth Justice Board, 2013³¹
- 'Guidance: How to use out-of-court disposals: section 1 case management guidance', Youth Justice Board, 2019³²
- 'Code for Crown Prosecutors', CPS³³
- CPS guidance:
 - 'Youth offenders'³⁴
 - 'Social media – Guidelines on prosecuting cases involving communications sent via social media'³⁵
 - 'Revenge pornography – Guidelines on prosecuting the offence of disclosing private sexual photographs and films'³⁶
 - 'Indecent and prohibited images of children'³⁷

When making representations against the prosecution of children and young people for sexting related offences, consider the following points:

- The criminal justice system treats children and young people differently from adults, and significant weight must be attached to the age of the suspect if they are a child. The best interests and welfare of the child or young person must be considered, including whether a prosecution is likely to have an adverse impact on the child's future prospects that is disproportionate to the seriousness of the offending. Prosecutors must have regard to the principal aim of the youth justice system, which is to prevent offending by children and young people.³⁸ Prosecutors must also have regard to the obligations arising under the United Nations 1989 Convention on the Rights of the Child.³⁹
- 'When assessing whether a prosecution is required in the public interest prosecutors must follow the approach set out in these guidelines as well as the wider principles set out in the Code for Crown Prosecutors. One factor that may warrant particular consideration is the involvement of younger or immature perpetrators. Children may not appreciate the potential harm and seriousness of their [social media] communications and as such the age and maturity of suspects should be given significant weight, particularly if they are under the age of 18.'⁴⁰
- 'It is essential in all youth offender cases to ensure that all of the public interest matters which give rise to the decision [to prosecute] are clearly identified, considered and balanced. A note of the factors identified but rejected or outweighed by other considerations should be made. This demonstrates that the decision to prosecute was taken only after a full review of the case and the background information, including that concerning the suspect provided by the youth offending service, police or local authority. Failure to show that the legal guidance has been followed and properly applied to all the information on the case may result in the decision to prosecute being quashed. See R (on the application of E, S and R v DPP [2011] EWHC 1465 (Admin)).'⁴¹

p5, bit.ly/3G8jtu3

30 bit.ly/3UrYbMf

31 bit.ly/3hv4yQz

32 bit.ly/3UrpKVU

33 bit.ly/20wSpfC

34 bit.ly/3A5cxtM

35 bit.ly/3UFSvP7

36 bit.ly/3EiL62m

37 bit.ly/3DYTT1p

38 s37(1) Crime and Disorder Act 1998

39 Crown Prosecution Service, Full Code Test, para 4.14d, bit.ly/20wSpfC

40 'Revenge pornography – Guidelines on prosecuting the offence of disclosing private sexual photographs and films', CPS guidance, bit.ly/3EiL62m

Should the police or CPS review maintain the decision to caution, the only potential remedy is judicial review. A caution can only be administered where the defendant admits the offence, and consideration should be given to the defences outlined above. Where the decision is to charge

with an offence and no defence is available, then there may be arguments if the CPS policy has not been followed to pursue either a judicial review of that decision, or argue an abuse of process under the second limb, that it would be unfair to try the defendant.⁴²

41 'Youth offenders', CPS guidance, bit.ly/3A5cxtM

42 R v BXR [2022] EWCA 1483

43 bit.ly/3tkfBOW

44 bit.ly/3EmPPAa

45 bit.ly/3G8jtu3

46 bit.ly/3WRg6Og

47 bit.ly/3ULV7KE

48 bit.ly/3TsajM1

Further reading

General

- ‘Now I know it was wrong: report of the parliamentary inquiry into support and sanctions for children who display harmful sexual behaviour’, Barnardos, 2016
- ‘Sharing nudes and semi-nudes: how to respond to an incident (overview)’, Department for Digital, Culture, Media and Sport and UK Council for Internet Safety, December 2020⁴³
- ‘Harmful sexual behaviour among children and young people’, NICE, 2016⁴⁴
- G Hales, ‘A “sexting” surge or a conceptual muddle? The challenges of analogue law and ambiguous crime recording’, The Police Foundation, 2018⁴⁵
- ‘Police recorded crime and outcomes: open data tables user guide’, Home Office, October 2016⁴⁶
- ‘Child Centred Policing: When to call the police – guidance for schools & colleges’, NPCC⁴⁷
- ‘Keeping children safe in education’, Department for Education, September 2022⁴⁸
- ‘Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children’, Department for Education, July 2018⁴⁹

Sentencing

- ‘Sentencing children and young people: overarching principles’, Sentencing Council, 2017⁵⁰
- ‘Sexual offences – Sentencing children and young people’, Sentencing Council, 2017⁵¹
- ‘Sentencing children and young people: overarching principles and offence specific guidelines for sexual offences and robbery – definitive guideline’, Sentencing Council, 2017⁵²

49 bit.ly/3hxgykg

50 bit.ly/3hv309d

51 bit.ly/3TtkqA6

52 bit.ly/3ULsrBG

#12
Sexting

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#01 Turning 18	#02 Intermediaries for child defendants	#03 Child Criminal Exploitation	#04 Criminal Behaviour Orders
#05 Trauma Informed Lawyering	#06 Criminal Practice Directions	#07 Effective Participation	#08 Police bail and remand
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Youth Justice Legal Centre
yjlc.uk

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

Doughty Street Chambers
doughtystreet.co.uk

Doughty Street Chambers offers extensive expertise across numerous child rights-related areas and has wide-ranging experience in bringing ground-breaking litigation for and concerning children in public law, extradition, immigration, mental health, community care, prison law, trafficking, education, criminal justice, clinical negligence and inquests. Many of our members specialise in complex and developing areas concerning the rights of children, including female genital cutting (FGC) and children, abortion rights for vulnerable teenagers, unaccompanied minors' rights, the education rights of children in custody, inclusive education for disabled children, children's effective participation in criminal trials, and the rights of LGBTQI children.

Just for Kids Law
justforkidslaw.org

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

The Dawes Trust

The Dawes Trust is a charity set up from funds of the estate of the late Christopher Dawes. The Trust's object is to fight crime, including organised crime, by the protection of people and property, the preservation of public order and the prevention and detection of crime for the public benefit.

The Trust provides funding to various organisations and projects in furtherance of its object.