

Written: February 2018

Introduction

Sexting, also described as sexy selfies or 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

The context in which 'sexting' takes place is highlighted by the findings of a report produced by the NSPCC:²

- Up to 40 per cent of young people may be involved in sexting. (page 6)
- Researchers for the report, going in to schools to meet with children and young people, were distressed by the levels of sexist abuse and physical harassment – even violence – to which the girls were subjected to on a regular basis. (page 28)
- A deeply rooted notion that girls' bodies are somehow the property of boys exists. Boys were found to have up to 30 pictures of different girls on their phones. (page 28)
- Young people live under the constant threat of having things they have said or done exposed to a huge audience. (page 41)
- Boys achieve credibility from their peers for having sexual photographs of girls on their phones and therefore they use it as popularity currency. (page 44)

How are children being criminalised?

Children are often unaware they might be committing a criminal offence, 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.

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Key Points

- The legislation which criminalises children for sexting was enacted to protect them. In many cases, children are being criminalised by virtue of their age.

- Outcome 21 may be a proportionate police response but the impact on a person's criminal record later in life is uncertain.

- There is considerable guidance and research for practitioners to use in their representations that children should be dealt with by way of informal diversion.

¹ NSPCC report, September 2016. Available at <https://www.nspcc.org.uk/what-we-do/news-opinion/1-6-reported-police-child-sexual-images-under-18/>: Accessed 02 February 2018

² Ringrose, J. and Gill, R. Livingstone, S. and Harvey, L. (2012) A qualitative study of children, young people and 'sexting': a report prepared for the NSPCC.

People who send and receive 'sexts' may be committing criminal offences if the sexual images in the messages are of under 18-year-olds.³ 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.

Often the circumstances in which the sexting takes place highlights the anomalies in the criminal law. Sixteen and seventeen-year-olds will be committing an offence if they sext each other but not if they have sexual intercourse.⁴ Younger adolescents living in the digital age may also experiment with sexting in a developmentally appropriate way as part of normal sexually explorative behaviour. Contradictorily, the legislation which criminalises them for sexting was enacted to protect them. In many cases, children are being criminalised by virtue of their age as there is nothing inherently criminal about the content of the messages they are exchanging.

At the other end of the scale is the sexting between children which is linked to cyber bullying and sexual violence against girls. However, 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 and young people's display of harmful sexual behaviour will naturally come to an end as they mature. Labelling younger children as sex offenders and subjecting them to stigmatising and intrusive interventions may actually prove counterproductive.

Offences

Protection of Children Act 1978, section 1(1) - Making, distribution, possession with intent to distribute indecent images of children

'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

³ *Protection of Children Act 1978, section 1(1)* - Making, distribution, possession with intent to distribute indecent images of children; *Criminal Justice Act 1988, section 160(1)* - Possession of an indecent photograph of a child

⁴ Sixteen and seventeen-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, 20 September 2016

(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.⁷

Maximum sentence: 10 years imprisonment.

Interpretation

What constitutes 'indecent' is an issue for the tribunal of fact to decide. The jury 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 out from a computer.¹¹
- opening an attachment to an email containing an image.¹²
- downloading an image from a website onto a computer screen.¹³
- 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, 88 Cr.App.R.302, CA

⁸ Protection of Children Act 1978, section 7(6)

⁹ Protection of Children Act 1978, section 2(3); Criminal Justice Act 2003 s.160(4)

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

¹¹ *ibid*

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 Protection of Children Act 1978, section 1(2)

Defences

Legitimate reason / lack of awareness - '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.¹⁶

Marriage and other relationships - 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.¹⁷

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.¹⁸

Criminal Justice Act 1988, section 160(1) - Possession of an indecent photograph of a child

'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 when 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.

Defences

Criminal Justice Act 1988, section 160(2)

'Where a person is charged with an offence section 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

¹⁶ Protection of Children Act 1978, section 1(4)

¹⁷ Protection of Children Act 1978, section 1A

¹⁸ Protection of Children Act 1978, section 1B

- (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 (set out above) are also available.

Police approach

The College of Policing recognise that in most cases of youth produced sexual imagery where there are no aggravating features the appropriate approach is to be supportive of the children involved, rather than a criminal process. Avoiding stigmatising children or causing them unnecessary fears and concerns.¹⁹

Sexting and Schools

Schools have a discretion 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 Child 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 Home Office Counting Rules (HOCR).²² Children may therefore have a sexting allegation recorded as a criminal offence on the Police National Database. To address this issue, the police have created 'Outcome 21'.

Outcome 21

When the police have been informed of a criminal offence but decide not to take any action, this is recorded on the Police National Database (PND) as 'no further action' (NFA). Outcome 21 is a police-generated code. If the police have found a child to have committed a sexting offence but have decided not to take any action, they may record this as Outcome 21 on the PND. This 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.' Outcome 21 may be considered the most appropriate resolution in cases where the sexting is non-abusive.

¹⁹ College of Policing (2016) Briefing note: Police action in response to youth produced sexual imagery ('Sexting'), p2

²⁰ Hales, G (2018) A 'sexting' surge or a conceptual muddle? The challenges of analogue law and ambiguous crime recording - The Police Foundation, p.3-4

²¹ UK Council for Child Internet Safety (undated) Sexting in schools and colleges: responding to incidents and safeguarding young people

²² Home Office Counting Rules For Recorded Crime (2015) Annexe B - Crime Recording (Schools Protocol)

Victims of grooming

Children who commit more serious sexting offences and may themselves have been the victim of a predatory adult or older child 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 Offenders' Register, notification requirements and barred list

Part 2 of the Sexual Offences Act 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 Offenders' Register (VISOR) - commonly known as the Sex Offenders' Register.

When a child is convicted of one of the sexting offences described above, the notification requirements are only triggered if they receive 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 and section 90 and 91 detention PCCSA 2000.²⁵ In relation to a detention and training order, 'term of imprisonment' has been held to mean the length of the period served in custody.²⁶

A caution or conviction for these offences will result in the child being automatically barred from working with children. They can apply to challenge this.²⁷

Criminal records

Youth cautions and convictions for the sexting offences outlined above will always be disclosed on an enhanced Disclosure and Barring Service (DBS) check and are never filtered. Even offences where the police have only recorded an allegation on the Police National Database and cases where the police took no further action such as Outcome 21 or triage, might appear on an enhanced criminal record check. 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 National Crime Recording Standard (NCRS) guides police forces on when to record crimes and the HOCA clarify how to record them. There is nothing in either which says 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

²³ Sexual Offences Act 2003, schedule 3, paragraphs 13 and 15

²⁴ Sexual Offences Act 2003, schedule 3, paragraph 95

²⁵ Sexual Offences Act 2003, section 131

²⁶ R v Slocombe [2005] EWCA Crim 2997

²⁷ Disclosure and barring service: relevant offences for England and Wales: Available at:

http://www.safeguardingdurhamadults.info/media/13639/DBS-referral-guide-relevant-offences-for-England-and-Wales/pdf/Relevant_offences_for_England_and_Wales.pdf, last accessed 23/02/2018

recorded elsewhere in the crime record.²⁸ There is an argument that personal details could be excluded from the record altogether.

What practitioners can do

Where the police have been made aware of a sexting allegation but have taken no further action and/or Outcome 21. Ask for the child's name to be removed from the 'victim' fields of the crime record.

If the police are considering a youth caution or prosecuting a child for 'sexting', defence lawyers need to 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 CPS to support a different and individualised approach when children commit sexting offences as opposed to adults. The representations will need to make reference to the following guidance:

- College of policing: briefing note: Police action in response to youth produced sexual imagery ('Sexting')
- Ministry of Justice and Youth Offending Board Youth Cautions (2013) Guidance for Police and Youth Offending Teams
- Youth Justice Board (2014) Out of Court Disposal Guidance
- Code for Crown Prosecutors
- CPS guidance on prosecuting Youth Offenders
- CPS guidance on prosecuting cases involving communications sent via social media
- CPS guidance on prosecuting the offence of disclosing private sexual photographs and films (revenge porn)
- CPS guidance on prosecuting indecent images of children

When assessing whether a prosecution is required in the public interest, prosecutors must follow the approach set out in the guidelines referred to above as well as the wider principles set out in the Code for Crown Prosecutors and legal guidance.

- 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 or young person under 18. 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 his or her 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

²⁸ The Police Foundation (2018) A 'sexting' surge or a conceptual muddle? The challenges of analogue law and ambiguous crime recording (2018) by Gavin Hales, p.5

young people. Prosecutors must also have regard to the obligations arising under the United Nations 1989 Convention on the Rights of the Child.²⁹

- 'The age and maturity of suspects should be given significant weight, particularly if they are under the age of 18 ... Children may not appreciate the potential harm and seriousness of their [social media] communications and a prosecution is rarely likely to be in the public interest.'³⁰
- '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)).'³¹

Once practitioners have asked the police to review their decision to issue a youth caution, should this approach be unsuccessful, the only potential remedy is judicial review.

Further reading

Barnardos (2016) Now I know it was wrong: report of the parliamentary inquiry into support and sanctions for children who display harmful sexual behaviour,

UK Council for Child Internet Safety (undated) Sexting in schools and colleges: responding to incidents and safeguarding young people

National Institute for Health and Care Excellence (NICE) (2016) Harmful sexual behaviour among children and young people

The Police Foundation (2018) A 'sexting' surge or a conceptual muddle? The challenges of analogue law and ambiguous crime recording by Gavin Hales

Sentencing

Sentencing Council (2017) Sentencing children and young people: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery – Definitive Guideline

²⁹ Crown Prosecution Service, Full Code Test, paragraph 14d

³⁰ Crown Prosecution Service guidance on prosecuting cases involving communications sent via social media

³¹ Crown Prosecution Service guidance on prosecuting youth offenders