

Sexting

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Contents

| | |
|---|----|
| 1. What is sexting? | 2 |
| 2. Teen-sexing | 2 |
| 3. How are children being criminalised? | 3 |
| 4. Defences | 3 |
| 5. Other offences | 4 |
| 6. Outcome 21 | 4 |
| 7. The consequences of prosecution and conviction | 5 |
| 8. Contextual information | 5 |
| 9. Defence barristers | 6 |
| 10. Prosecution barristers | 7 |
| 11. Further reading | 10 |

“ As mobile digital technologies come to permeate more and more aspects of young people’s lives, the production, consumption and distribution of sexual communications is becoming an increasingly ‘taken-for-granted’, yet problematic, feature of the social and cultural landscapes they inhabit. ”

- A Qualitative Study of Children, Young People and ‘Sexting’, a report prepared for the NSPCC Ringrose, Gill, Livingstone & Harvey (2012)

This guide sets out to define sexting and how children and young people can find themselves facing criminal convictions for what seems like harmless sexual experimentation in a digital age. The guide will help practitioners who are instructed to prosecute and defend children and young people in these cases to navigate the legislation, understand possible diversionary tactics and the context within which much of this offending takes place. A glossary of terms has been created to accompany this guide.

What is sexting?

Put simply, sexting is a media-invented term and is the exchange of sexual messages or images through mobile phones and/or the internet. It is a gender-neutral activity and it is not confined to children and young people. The taking, possessing, publishing and distributing an indecent image of someone under 18 is illegal. This includes a self-image (selfie).

Teen-sexting

Teenagers use a wide range of messaging services, email and social media apps such as Snapchat, WhatsApp or Facebook Messenger to ‘sext’ and 83% of 12-15 year-olds own a [smartphone](#).

Sexting is a complex phenomenon of societal attitudes towards young people and sex. Sexting between children is linked to cyber bullying and sexual violence against girls.

The National Institute for Health and Care Excellence (NICE) has produced a report on harmful sexual behaviour among children and young people,¹ which highlights the fact that inappropriate sexualised behaviour, which can include sexting, is often an expression of problems or underlying vulnerabilities.

¹[‘Harmful sexual behaviour among children and young people’](#), NICE guideline, 20 September 2016.

How are children being criminalised?

Anyone who sends and receives 'sexts' may be committing a criminal offence if the sexual images in the messages are of a child under 18 years of age.

The relevant legislation is section 1 of the Protection of Children Act 1978 (PCA) (England and Wales), as amended in the Sexual Offences Act 2003 (England and Wales), and section 160 of the Criminal Justice Act 1988 (CJA). It is an offence to possess, distribute, show and make indecent images of children. A child is defined as anyone under the age of 18.²

'Indecent' is not defined in legislation. When cases are prosecuted, the question of whether any photograph of a child is 'indecent' is for the tribunal of fact (i.e. a jury, magistrate or District Judge) to decide based on what is the recognised standard of propriety.³ It is an objective test.⁴ Without being prescriptive, for most purposes, if imagery contains a naked young person, a topless girl, and/or displays genitals or sex acts, including masturbation, then it will be considered indecent. Indecent images may also include overtly sexual images of young people in their underwear.

For the purposes of this legislation, 'make' means 'to cause to exist, to produce by action, to bring about'.⁵ There is no finite definition but it can include photographing or filming,⁶ downloading an image onto a disc or printing it out from a computer,⁷ opening an attachment to an email containing an image,⁸ downloading an image from a website onto a computer screen,⁹ or accessing a website in which images appeared by way of automatic "pop-up" mechanism.¹⁰ The [CPS Guidance](#) further suggests that an individual who livestreams a video or image could also be taken as having made an image.

To establish that the indecent image was in the person's possession it must be shown that: a) the images were in their custody or control i.e. so that they are capable of accessing, or in a position to retrieve the image(s); and b) the person knew that they possessed an image or group of images on the relevant device/devices. Knowledge of the content of those images is not required.¹¹

In cases when the images have been deleted, it will be necessary to show the person knew how to retrieve them, for example, was aware deleted images had been cached or was able to retrieve them.

Ironically, the legislation which was enacted in order to protect children and young people has become responsible for criminalising them for sexting.

Defences

Whilst there are defences applicable to these crimes, it is unlikely they will be relevant to a young offender. The two defences at s.1(4) PCA 1978 are having legitimate reason for distributing or showing

²Section 7(6) PCA

³R v Stamford [1972] 56 Cr App R 398

⁴R v Neal [2011] EWCA Crim 461

⁵R v Bowden [2000] 1 Cr App R 438,

⁶[R v WP \[2016\] EWCA Crim 745](#)

⁷R v Bowden [2000] 1 Cr App R 438

⁸R v Smith [2002] 1 Cr. App. R. 13

⁹[R v Jayson \[2002\] 1 Cr. App. R. 13](#)

¹⁰[R v Harrison \[2008\] 1 Cr. App. R. 29](#)

¹¹R v Okoro (No. 3) [2018] EWCA Crim 1929 at para 46

the photographs or pseudo-photographs or (as the case may be) having them in one's possession; or not having seen the photographs or pseudo-photographs and not knowing or having cause to suspect them to be indecent.¹² The burden is on the individual charged to establish the defence.¹³ 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, that too is a defence.¹⁴ However, the defence does not apply where the couple are over 16 and are living separately.¹⁵

Other offences

Section 62 of the Coroners and Justice Act 2009 makes it an offence to possess a prohibited image of a child (i.e. someone under 18¹⁶). A prohibited image is one which is pornographic; is one which focuses solely or principally on a child's genitals or anal region, or portrays the performance of a specified sexual act involving a child;¹⁷ and which is grossly offensive, disgusting or otherwise of an obscene character. The [CPS Guidance](#) states that this offence is targeted at non-photographic images. Section 64 sets out the available statutory defences.

Section 33 of the Criminal Justice and Courts Act 2015 is not a specific offence to protect children but makes it an offence to disclose a private sexual photograph or film if the disclosure is made—(a) without the consent of an individual who appears in the photograph or film; and (b) with the intention of causing that individual distress. The section, therefore, seeks to criminalise behaviour known as 'revenge pornography'. Section 33 also sets out the statutory defences available.

Outcome 21

In January 2016, the NPCC,¹⁸ Home Office¹⁹ and the DBS²⁰ agreed a new Outcome 21 code for 'youth-produced sexual imagery' in England and Wales. Outcome 21 is as follows:

"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."

When the police are notified about youth produced sexual imagery, it must be recorded as a crime in line with Home Office Counting Rules (HOCR). The incident is listed as a crime, and the young person is the suspect. This is not the same as a criminal record. Outcome 21 gives the police a discretion not to take further action if it is not in the public interest, even though there is enough evidence to prosecute. The College of Policing guidance suggests that outcome 21 may be appropriate in cases where: a) a young person's sexting was not abusive or persistent; and b) there is no evidence of exploitation, grooming, profit motive or malicious intent.²¹

¹² Protection of Children Act 1978, section 1(4)

¹³ R v Okoro (No. 3) [2018] EWCA Crim 1929 at para 45

¹⁴ Protection of Children Act 1978, section 1A

¹⁵ R v DM [2011] EWCA Crim 2752

¹⁶ Section 65(5) Coroners and Justice Act 2009

¹⁷ Section 62(7) Coroners and Justice Act 2009

¹⁸ [National Police Chiefs Council](#)

¹⁹ [Home Office](#)

²⁰ [Disclosure & Barring Service](#)

²¹ [Police dealing with rising number of 'sexting' cases involving children](#), 6 November 2017

It is likely that having applied this code, the offence will not appear on a future enhanced DBS check. This is not guaranteed, as disclosure is a risk-based decision. For example, if there are similar related activities, then disclosure is more likely. Youth cautions and convictions for sexting offences will always be disclosed on an enhanced Disclosure and Barring Service (DBS) check and are never filtered.

The consequences of prosecution and conviction

Part 2 of the Sexual Offences Act 2003 requires those convicted or cautioned for specified offences to notify the police of certain personal details. The police keep this information on the Violent and Sex Offenders' Register (ViSOR). However, if a child is convicted of a sexting offence, the notification requirements are only triggered if the child receives a sentence of imprisonment of 12 months or more.²²

The relevant age is that of the child on the date of the offence.²³

The term 'sentence of imprisonment' includes detention and training orders and s 90 and 91 detention PCCSA 2000.²⁴ In relation to a detention and training order, 'term of imprisonment' has been held to mean the length of the period served in custody.²⁵ However, the notification period for a person under the age of 18 is half of the period specified for an adult.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

Contextual Information

The following findings of the 2016 NSPCC report²⁸ provide important contextual information:

- Up to 40 per cent of young people may be involved in sexting.
- The prevalence of mobile internet technologies in children's lives is dramatically reshaping modes of communication, peer intimacy and even romantic attachments.
- Researchers for the report going into 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 subject on a regular basis.
- 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. Examples included pictures the girls had sent the boys of their breasts with captions such as 'Jason owns me' scrawled across them.

²² Sexual Offences Act 2003, schedule 3, paragraphs 13 and 15

²³ Sexual Offences Act 2003, schedule 3, paragraph 95(b)

²⁴ Sexual Offences Act 2003, section 131

²⁵ [R v Slocombe \[2005\] EWCA Crim 2997](#)

²⁶ Sexual Offences Act 2003, section 82(2)

²⁷ [Disclosure and Barring Service: relevant offences for England and Wales](#)

²⁸ [NSPCC: A qualitative study of children and 'sexting'](#)

1. The more recent NSPCC report 'How safe are our children?' also includes an expert insight into understanding and responding to sexting.

Defence barristers

When defending a child or young person charged with an offence of sexting, an advocate should 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 approach when children commit sexting offences. Any representations will need to make reference to the following guidance:

- ACPO Youth Offender Case Disposal Gravity Factor Matrix (March 2013)
- [Youth Cautions – Guidance for Police and Youth Offending Teams](#), Ministry of Justice and Youth Offending Board (8 April 2013)
- CPS guidance on [prosecuting Youth Offenders](#)
- CPS guidance on [prosecuting cases involving communications sent via social media](#).
- Youth Justice Board [Out of Court Disposal Guidance](#) (1 May 2019)
- [Code for Crown Prosecutors](#) – in particular at 4.14(d)
- List of offences that will never be filtered from a [DBS certificate](#) (2 December 2013)
- [CPS guidance](#) on prosecuting the offence of disclosing private sexual photographs and films (revenge porn).
- [CPS guidance](#) on prosecuting indecent images of children.

When considering drafting a submission to the prosecuting authorities to request that a matter be reviewed and possibly discontinued, advocates will need to take instructions from their client about their personal circumstances. Great care should be exercised when making an assessment of a child or young person's general level of maturity and their knowledge and understanding of sexual matters.

Advocates should consider seeking a report from a school or college and possibly a child psychologist to assess the child or young person's abilities, intelligence and emotional intelligence. The views of parents', guardians' or carers' may also be very relevant.

The consequences of a conviction upon a child or young person and their family are important issues when making representations in these types of cases and this aspect should therefore be borne in mind when taking instructions.

Practitioners can also consider asking the police to review their decision to issue a youth caution. Should this approach be unsuccessful, the only potential remedy is judicial review.

Prosecution barristers

[CPS guidance](#) suggests 'sexting' between children or sharing of 'youth-produced sexual imagery' should not be routinely prosecuted and advises prosecutors that 'care should be taken when considering 'sexting' that involve images taken of persons under 18.' It goes on to state that 'it would not usually be in the public interest to prosecute the consensual sharing of an image between two children of a similar age in a relationship, a prosecution may be appropriate in other scenarios.'

When assessing whether a prosecution is 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. Some helpful excerpts are:

- 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 young people. Prosecutors must also have regard to the obligations arising under the United Nations 1989 Convention on the Rights of the Child. As a starting point, the younger the suspect, the less likely it is that a prosecution is required. However, the severity of the offence, the child's past record and whether they have made an admission are significant considerations.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

²⁹ Crown Prosecution Service, Full Code Test, para 4.14.d

³⁰ Crown Prosecution Service guidance on Revenge Pornography-Guidelines on prosecuting the offence of disclosing private sexual photographs and films

³¹ Crown Prosecution Service guidance on prosecuting youth offenders

Glossary of terms

Instagram (<https://www.instagram.com/>)

This is a picture and video sharing app which allows users to share images, make comments and post messages. Instagram also allows for stories to be shared. These tend to be short burst videos or “boomerangs”. Instagram boasts the number of followers a user has and there are functions that can be bought at relatively small cost to boost the number of followers. Accounts can be private in which case a user can only be followed if they agree to be followed by someone. Users can block and unfollow people. The distinction between public and private sharing of content on Instagram is debateable, because some users have thousands of followers. It is not uncommon for young people to advertise their Instagram usernames publicly on other social media sites such as YouTube and Twitter, and invite people to follow them. Accounts that share content with large numbers of followers would more accurately be described as semi-public, especially given the relatively indiscriminate nature with which people are accepted as followers.

Snapchat (<https://www.snapchat.com/>)

This App makes it possible to share images or videos. The ‘snap’ is shared with a chosen person or group of people and then disappears after a few seconds. The length of time a snap can be made available can be altered. It is easy to take a screenshot of a snap and then this can be distributed. The sender of a snap will be notified if a screenshot has been taken. Snapchat has a facility to add various filters to a photograph or video and there are editing and text facilities. Any snap can be stored in the memories section of Snapchat. Snapchat also allows for the sharing of Snapchat Stories in a sequence across a 24 hour period. Snapchat provides a reporting function. Snapchat users can block other users. It is also possible to have ‘typed’ conversations on Snapchat which are stored on the Smartphone.

Twitter (<https://twitter.com/>)

Twitter is a social networking service allowing people to exchange a short message, referred to as a “tweet”, and limited to 280 characters. Tweets can include photos and short videos. It is possible to have a private Twitter account and control who can see any tweets, but the vast majority of Twitter users choose to have public accounts. Twitter users can ‘follow’ the accounts of other Twitter users, enabling them to automatically receive messages posted from these accounts on a stream which appears on the app’ chronologically. A person who wishes to share another person’s tweet can ‘retweet’ the message, meaning that it is then shared with all of the people following the re-tweeter’s account. If this happens many times, it means that the original tweet ‘goes viral’. It will be viewed by millions in a short space of time. This is not slowed even if the original tweet is deleted.

WhatsApp (<https://www.whatsapp.com/>)

This is a messaging service where users can share pictures, text or videos. These can be shared with one person or multiple users. Users can block other users. WhatsApp is an encrypted service. Users can adjust settings so that contacts will not know if a WhatsApp has been read or not. Usually if a photograph or video is sent via WhatsApp then it will be automatically saved in the photos app on a smartphone.

YouTube (<https://www.youtube.com/>)

This is a video-sharing website which allows anyone to upload and share a video. Some such videos quickly go viral such as the inoffensive 'Charlie bit me'. People can visit YouTube either through a webpage (www.youtube.com) or through the YouTube app, which can be downloaded onto a Smartphone. People are able to browse through all of the videos available on YouTube by typing keywords into a search box. Although it is possible to upload content and restrict access, the vast majority of videos are made fully available to anyone browsing the site.

Teenage sext slang

The list produced here is not exhaustive. [The Urban Dictionary](#) may be a useful source when confronted with slang words or unusual acronyms.

2FFU – Too fast for you

9 – a parent is watching

ASL – Age Sex Location

Bae – this is the equivalent of 'babe' or 'babes' & before anyone else

Bruh – nickname for bro

BYOB – Bing your own booze

CBA – Can't be arsed

CU46 – see you for sex

Curve – to reject someone romantically

DIY – Do it yourself

Down in the DM – plans for an oncoming sexual liaison

DPMO – Don't piss me off

Emojis – It is becoming more and more common to use emojis in sexting and to join them together to make sentences

Fam – used for their closest friends

FBOI – A guy who wants sex

FFS – For fucks sake

FINSTA – Fake Instagram account

FML – Fuck my life

FWB – Friends with benefits

FYEO – For your eyes only

GOAT – greatest of all time

Gucci – something is good or cool

HMU – Hit me up

I'm weak – that was funny

IMHO – In my humble opinion

KMT – Kissing my teeth

KOTL – Kiss on the lips

Lit – cool or awesome

Low key – a warning that what a young person is saying is not necessarily something they want everyone to know

Netflix 'n Chill – is used on the pretence of meeting up to watch Netflix/TV together when actually planning to meet for sexual contact

NGL – not going to lie

NIFOC – naked in front of computer

PAL – Parents are listening

PAP – Post a picture

QTC – Quick to cum

RME – Rolling my eyes

Salty – to be bitter about something or someone; to be put out

Scrape out – to mind your own business

Shipping – Put people in a relationship together

Skurt – to go away or leave

Smash – casual sex

SMH – Shaking my head/So much hassle

Squad – a term for their friend group

TBH – to be honest

Thirsty – being desperate for something

WTF – What the fuck

WTTP – Want to trade pics?

WYDRN – What you doing right now?

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

[Sexting in schools and colleges](#): responding to incidents and safeguarding young people

[NICE guideline](#): harmful sexual behaviour among children and young people

[Sexual offences – Sentencing children and young people](#)

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Page 11 of 11

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