

A 'SEXTING' SURGE OR A CONCEPTUAL MUDDLE? THE CHALLENGES OF ANALOGUE LAW AND AMBIGUOUS CRIME RECORDING

Gavin Hales
Associate Fellow
The Police Foundation
31 January 2018

THE
POLICE
FOUNDATION

The UK's policing think tank

Introduction

‘Sexting’ – the sending and receiving by children and young people of ‘youth produced sexual imagery’¹ – has emerged as a growing phenomenon in recent years, facilitated by the advent of near universal smart phone ownership.² While it may often take place within the confines of consensual sexual relationships, in some cases ‘sexting’ has been associated with bullying, threats or exploitation, with significant consequences for the subjects of the images, particularly where those images are widely circulated without their consent. At times the police have been called on to act, whether by victims or for example their parents or schools. The response of police forces and the wider criminal justice system has periodically been called into question with allegations that children have been unduly criminalised, particularly following publicity given to individual cases (eg BBC, 2015).

The National Police Chiefs’ Council (NPCC) recently published new data on the nature of ‘sexting’ by children (under 18), as recorded by police forces in England and Wales, under the headline ‘Police dealing with rising number [of] ‘sexting’ cases involving children’ (NPCC, 2017). They reported that there has been a ‘surge in children sharing or possessing sexual images of themselves or others’ with recorded offences more than doubling in three years; that girls are recorded as victims three times as often as boys; and that girls and boys are equally likely to be recorded as suspects or perpetrators.

This paper discusses whether a meaningful line can be drawn from the NPCC data to the nature and underlying social issues associated with ‘sexting’, including who is

involved, how ‘sexting’ is changing over time, and how the police service is responding. In addressing those questions this paper identifies a *conceptual muddle* at the intersection of four factors that will be examined in some detail:

- Antiquated law that did not anticipate digital technology, including children taking and distributing indecent images of themselves.
- Complex and ambiguous police crime recording and counting rules and practices.
- Attempts to avoid unnecessarily ‘criminalising’ children.
- Crime data published with limited detail and without caveats.

It concludes by asking if the law on ‘indecent images of children’ needs updating with some specific exemptions for children, to reflect the world as it is today and avoid logically counterproductive consequences, including the risk that children may be deterred from reporting victimisation where it involves images they took of themselves.

To illustrate the discussion, this paper will use an example allegation from the relevant Home Office Counting Rules for Recorded Crime (HOCR) (Home Office, 2017a), which we will assume has been reported to and recorded by the police:

‘A 15-year-old boy whilst online asks a 14-year-old girl that he knows at school to send him pictures of her breasts and she does so.’

For reference – we’ll return to this later – the Counting Rules state that these events, taken at face value, should result in two crimes being recorded:

‘One crime of sexual activity involving a child under 16 (class 22B – 22/24) against the male. One crime [of taking/making/distributing indecent photographs or pseudo-photographs of children] (class 86 – 86/2) in respect to the female who forwarded the images unless she was unduly forced into doing so.’

1 ‘Youth produced sexual imagery’ is the definition used by the National Police Chiefs’ Council (NPCC, 2017).

2 In a 2017 survey of UK consumers, 92 per cent of teenagers were reported to own a smartphone, which they checked on average 90 times per day (Deloitte, 2017: 10).

An analogue law in a digital era

Under the Protection of Children Act 1978 (as amended) it is an offence to take, make or permit to be taken, distribute or show, possess, or publish indecent photographs (or 'pseudo photographs') of children. Section 160 of the Criminal Justice Act 1988 tightened the law around possession, while the Sexual Offences Act 2003 defined the age of a child as under the age of 18, rather than under 16 as had been the case previously.³

The relevant Crown Prosecution Service (CPS) guidance relating to indecent images of children (CPS, no date, a) cites a 1988 ruling from the Court of Appeal which, in describing the legislation, states:

*'[Its] object is to **protect children from exploitation and degradation.** Potential damage to the child occurs when he or she is posed or pictured indecently, and **whenever such an event occurs the child is being exploited.**' (R v Land [1998] 1 Cr. App. R. 301, emphasis added).*

It seems unavoidably relevant that both the law and the 1988 Court of Appeal judgement were written in the analogue era of film cameras, print photos and transparencies, and certainly before the internet and the advent of near universal digital smartphone ownership, 'selfies' and the 'viral' circulation of photos and other content by digital means.

As the 14-year-old girl in our example commits an offence in the first place simply by taking an indecent photograph of herself, it appears the Court of Appeal assertion that she must necessarily be being exploited may well be wrong, at least in this instance. As the 'suspect', how can she exploit herself?

On the other hand, one of the perils of digital imagery is the ease of storage and distribution, so the notion of protecting children, even from themselves, is arguably well-founded, even though the latter was not the focus when the law was enacted. Whether the criminal law is in all cases the appropriate mechanism for mitigating that risk, however, is the active subject of debate. Police forces are increasingly seeking to avoid criminalising children where there are no aggravating factors (see College of Policing (2016) and the discussion below) while others have argued, for example, in favour of an emphasis on educating children and young people

3 Illustrating the potentially problematic nature of the law, the Sexual Offences Act 2003 also provides exemptions for those aged 16 or 17 who are married, in civil partnerships or otherwise 'living together as partners in an enduring family relationship'.

about the ethics of 'sexting', including consent and privacy (Setty, 2016).

The key decision point in terms of police involvement, crime recording and the criminal justice processes that follow is whether an alleged offence is reported to the police. Many, perhaps most, won't get that far. For those that do, police forces must consider whether and how to record the allegation, including how it will be counted for crime statistics purposes, and ultimately they must decide how to deal with the case in front of them.

Complexities of crime recording and counting

The National Crime Recording Standard (NCRS) guides police forces on when to record crimes and the Home Office Counting Rules for Recorded Crime (HOCR) clarify how to record and count them for statistical purposes. The two necessarily interact.

The NCRS was introduced in April 2002 to 'promote accurate and consistent crime recording between police forces' and 'to take a victim oriented approach to crime recording' (Home Office, 2017b). In general, if an incident is reported to the police, that on the balance of probabilities appears to be a notifiable offence that has a victim, then a crime *must* be recorded by the police force in question. For 'state-based' crimes including almost all of those concerning indecent images of children (and elsewhere offences like possession of drugs), a crime should be recorded where the 'points to prove to evidence the offence' are clearly 'made out'.⁴ In our example, that means that there is evidence an image had been 'made' that was indecent and of a child.

There are exceptions, including less serious crimes in schools, where there is a general presumption that they will be dealt with as disciplinary matters by schools.⁵ 'Sexting' offences, falling under 'obscene publications' laws, constitute 'serious incidents' and must therefore *always* be recorded as crimes *once reported to the police*, whether inside or outside of a school environment. Of course, schools can – and many apparently do – choose not to involve the police at all, and in at least some cases police forces actively encourage schools to deal with 'sexting' as

4 Some categories of Obscene Publications offences can be victim-based; these are where 'extreme pornography' or 'possessing prohibited images of children' offences are involved (see Home Office, 2017a; Criminal Justice and Immigration Act 2008; Coroners and Criminal Justice Act 2009).

5 See the Schools Protocol at Annexe B of Home Office (2017b).

a disciplinary matter where there are no aggravating factors.⁶

To summarise: in our example above, once reported to a police force that force **must** record the allegations as crimes, assuming there is evidence of an 'indecent image of a child'. There is no discretion to do otherwise under the NCRS.

So how many crimes should be recorded in our example? According to the HOOCR, and our example is drawn from the most recent (April 2017) iteration at the time of writing (Home Office, 2017a), these events should result in the following crimes being recorded:

'One crime of sexual activity involving a child under 16 (class 22B – 22/24) against the male. One crime [of taking/making/distributing indecent photographs or pseudo-photographs of children] (class 86 – 86/2) in respect to the female who forwarded the images unless she was unduly forced into doing so.'

One incident therefore results in **two crimes**. Although the girl took and then distributed the indecent image, that would only count as a single offence. It will be up to the police force or individual police officer to decide how to record the other details, but it appears there would ordinarily be **two suspects** (one per crime), and **one (or maybe two) victims**.⁷

Several discussion points follow:

- **A victimless crime?** In the case of the girl photographing herself and then sending the boy the photograph, she is, in both actions, committing offences (taking and then distributing indecent images of a child) and may therefore be treated as the suspect.⁸ We have seen that these offences are almost always state-based rather than victim-based, but that does not seem necessarily to preclude the girl also being considered a 'victim' (although whether she can be a victim of her own actions is questionable). We will see below that the recent NPCC data include information on the profile of victims in 'sexting' cases, which suggests that in practice police forces do record victims in these largely state-based offences (including where images

are circulated without consent and the subject is considered a victim).⁹

- **Engaging in sexual activity with a child.** Intuitively, it is not clear why forwarding an indecent image to a child does not constitute 'engaging in sexual activity' with that child, given that requesting such an image apparently does. The answer seems to lie in avoiding unwieldy crime counts, given that 'sexual activity' (a victim-based crime) and 'indecent image' offences (state-based) by the girl would both be counted, as might the (state-based) possession offence presumably committed by the boy having received and retained the image. That potentially gives us four crimes for one incident when added to the boy's offence of 'sexual activity involving a child under 16'. We might at least conclude that this underlines the apparent difficulty the law and guidance have with demarcating and enumerating sexual relationships between teenagers when indecent images are involved.
- **Onward circulation of images.** A particular issue that has arisen in respect of 'sexting', and apparently often the reason it comes to the attention of parents, schools and the police, is the unauthorised onward circulation of images, for example between peers, through a school community or even posted online. This may constitute a form of cyber-bullying with significant consequences for the person whose image is shared. Here the **amplificatory effect of digital technology** is highly relevant, however it is unclear how strictly or consistently police forces adhere to the NCRS and HOOCR rules where an indecent image is known to have been circulated in such a way. If the boy in our example forwarded the image to five friends, each of whom forwarded it to another five friends who in turn knowingly retained the images, and the police were made or became aware of this, then with the NCRS and HOOCR strictly applied we might potentially end up with six offences of making/distribution and a further 25 of making/possession, which with the two original crimes would give us a crime count of 33.¹⁰

6 The UK Council for Child Internet Safety (2017) has issued updated guidance to schools, including on when to report to the police and what the police may be able to do.

7 There may be two victims if the girl is counted as a 'victim' of her own actions.

8 For police purposes there is no definition or standard guidance on when anyone is deemed to be a suspect, except in cases of homicide.

9 In relation to the state-based treatment of these offences, it should be reiterated that 'indecent images of children' can include 'pseudo-images', which could not be understood to have victims. Note that the NPCC data are concerned only with 'obscene publications' offences, which include indecent images of children, and therefore not the 'sexual activity involving a child under 16' offence in our example.

10 According to the relevant CPS guidance (CPS, no date, b), possession of indecent images is relatively rarely charged as 'making' such images is very broadly framed and generally applies in cases that might otherwise be thought of as 'possession'.

Ambiguity and risks of inconsistency in the way police forces structure crime records

While the NCRS and HOCR are very clear about whether a crime should be *recorded* in the first place and (in general) how it should be *counted*, they have nothing to say about the other details of crime recording, which are left to local forces to determine. This would extend to determining whether any of those involved should be recorded as complainants/victims, suspects/perpetrators, witnesses or some other category. We have already seen that the victim status of the girl in our example is at least ambiguous in the case of the self-generated image, but also in the event of any onward distribution – not least as these are almost always state-rather than victim-based offences. Moreover, there may be circumstances in which the recipient of an indecent image might be considered a victim, for example if it was sent to them without their consent (perhaps as an offence of exposure, although this requires intent to cause alarm or distress).¹¹

Here we should turn our attention briefly to the express desire by the police to avoid disproportionately responding to teenage sexuality where offences are alleged but there are no other aggravating or risk factors present (for example abuse, exploitation, coercion or violence) – in particular to avoid ‘criminalising’ such behaviour (discussed further below).

There is nothing in either the NCRS or HOCR that says that a police force *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. So those details could conceivably be recorded elsewhere in the crime record, for example in free text fields, or even left in accompanying command and control text data or intelligence reports.

It may not be possible or even desirable to be too prescriptive about how to structure crime records, given the likely wide variation in individual cases and the need for officers to be able to use appropriate discretion. However, some broad guidance (if it does not already exist) could nevertheless assist in ensuring a reasonable degree of consistency in decision making between cases and police forces.

¹¹ An alternative could be an offence of ‘improper use of electronic public communications network’ under Section 127 of the Communications Act 2003.

In any case, the **varying interaction of four factors** could conceivably result in different crime record construction practices between forces and therefore a **lack of comparability of any resulting statistics** including crime counts and victim or suspect profiles:

- Potential ambiguity about the victim/suspect classification.
- A lack of guidance to forces about how to record such information.
- The degree to which forces rigorously seek to identify and then record separate crimes where images are circulated and widely ‘possessed’ or ‘made’.
- A desire to avoid ‘criminalising’ children when it is considered disproportionate, including by encouraging (or not) schools and others to avoid making reports to police.¹²

Returning to the recently published NPCC data, that might at the very least imply that data on the profiles of victims and suspects should be considered potentially rather problematic.¹³

Reflecting on the question of ‘criminalisation’

It is understood that the question of ‘criminalisation’ has been discussed at some length by stakeholder organisations including the NPCC and Home Office. The view that has prevailed, reportedly being that of the Home office, which ‘owns’ policy in this area, and not universally shared¹⁴, is that:

- A child having their details recorded in a police (ie. crime) database does not constitute criminalising them, the argument being that criminalisation would only result from a formal sanction such as a caution or conviction.

¹² The more recently published guidance for schools may have resolved some of this (UK Council for Child Internet Safety, 2017). A serving police officer with recent experience in these matters reported to the author that their force will “push back and encourage” schools to deal internally with ‘sexting’ cases if the schools report them to the force (personal correspondence, November 2017). This would appear to be in breach of a strict application of the NCRS.

¹³ For example, in the case that the girl’s image in our example is distributed to multiple recipients, she may be counted as the victim for each instance. Any ‘victim profile’ relating to the force in question may be heavily skewed by a small number of these widely circulated images, and the resulting aggregate ‘victim profile’ may not be helpful in terms of understanding the nature of victimisation and informing the development of policy. That might imply the need for analysts producing statistics to have access to personalised data so they can remove duplicate victims, and for the different ways of counting victims (or suspects) to be clarified in any publications.

¹⁴ According to personal correspondence with a police service contact familiar with these discussions (November 2017).

- Forces are under no obligation (at least insofar as the NCRS and HOCR are concerned) to record personal details, including the names of victims and suspects.

Instinctively, it seems reasonable to take issue with both assertions.

First, it is not clear how a child having their details recorded against an offence of ‘sexual activity involving a child under 16’ or taking and distributing ‘indecent images of children’, can ever be a neutral act, unless they are definitively cleared of suspicion.¹⁵ Any future checks of police records for their personal details (including name and date of birth) would very likely highlight their connection to these offences.¹⁶

Second, it seems almost unimaginable that a force would choose *not* to record the personal details of the child or children involved – not least given a strong concern to **safeguard** children, including in case those named reoffend or are re-victimised in future, however benign the initial incident may be.¹⁷ The implication would seem to be that the obligation to record a crime under the NCRS implies an obligation to record the personal details of victims and suspects. In any case, even if the obligation to record a crime did not exist, it is still hard to imagine a police force not recording personal details anywhere – for example in command and control/incident, intelligence or child protection databases.

It seems, therefore, that we must work from the presumption that **personal data will always be recorded when a ‘sexting’ incident is reported to the police.**

The wider ‘proportionate’ approach that the police service and others have adopted is two-fold.¹⁸

- In January 2016 the Home Office introduced a crime outcome (alongside charging, giving a caution and other alternatives) called ‘Outcome 21’. This states that ‘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’.

- Police forces are now giving assurances about the approach that would be taken if a suspect for these offences ever required vetting by the police in the future as part of an Enhanced Disclosure and Barring Scheme (DBS) check, for example because they wanted to work in healthcare or childcare.¹⁹

The introduction of ‘Outcome 21’ seems eminently sensible, reconciling the requirement to record alleged crimes under the NCRS, and the requirement to record an outcome from a pre-determined list, with the desire to take a proportionate approach, particularly in cases with no aggravating factors.

The DBS check assurances are, unfortunately but probably inevitably, less definitive, with the risk that they may still act to deter young people from reporting their own victimisation when they would otherwise do so, for example because an image they took and willingly sent to a boyfriend/girlfriend has been circulated onwards. As things stand, police forces (specifically chief constables) have considerable discretion over whether to disclose ‘Outcome 21’ allegations as part of DBS disclosures.²⁰ While many decisions are likely to be straightforward, we can imagine others that could be more problematic: for example, an undergraduate applying to work in child social care, who was involved in a ‘sexting’ case as a 17-year-old; or a school leaver applying to work as a nursery assistant with a similar history. And it is conceivable that someone named as a suspect in an ‘Outcome 21’ case could go on to commit further sexual offences, in which case that initial incident must surely be disclosable (an observation which underlines the imperative for police forces to record personal details about those involved in ‘sexting’ cases). It is also conceivable that formal guidance and the judgement of chief constables around disclosure could change in future, and today’s reassuring messages be superseded.

Finally, the possibility remains that a police force could decide to delete personal details or records.²¹ It is

¹⁵ Although that may not settle matters as even acquittals at court may be mentioned on Enhanced Disclosure and Barring check certificates. This is the subject of a case heard in November 2017 but not yet decided by the UK Supreme Court (R (on the application of AR) vs Chief Constable of Greater Manchester Police and another [2017] UKSC 2016/0144 – see <https://www.supremecourt.uk/cases/uksc-2016-0144.html>).

¹⁶ Although it is true that Police National Computer (PNC) records, created following a conviction or other sanction, will be most readily accessible.

¹⁷ In cases where schools are involved, this relies on schools taking appropriate decisions about when to involve police.

¹⁸ Fuller details can be read in the relevant guidance for police forces published by the College of Policing (2016).

¹⁹ Enhanced DBS checks will identify any police records of convictions, cautions, reprimands and warnings, but also other sources including ‘other relevant information disclosed at the Chief Police Officer(s) discretion’.

²⁰ Since July 2017 the HOCR has included commentary that ‘Outcome 21’ is to be used by Disclosure and Barring staff in forces to ensure they take great care before recommending any such crime is disclosed. Further guidance for disclosure units is available in Disclosure and Barring Service (2016).

²¹ Although see the College of Policing (2016) briefing for a discussion of how police forces should deal with indecent imagery of children, including any devices on which they are stored.

relevant here that the mother of a boy who was 14 when he sent a naked photo of himself to a girl, which was reported to the police, has recently secured a judicial review of the decision by Greater Manchester Police to refuse to destroy records of his personal details (BBC, 2017).²²

The NPCC data leaves more questions than answers

Bearing the above discussion in mind, we now turn to the data published recently by the NPCC under the headline ‘Police dealing with rising number [of] ‘sexting’ cases involving children’.

First, it is worth clarifying the search terms used to collate the data from individual forces to produce the national picture (for England and Wales). These are crime records from the three-year period between 2014/15 and 2016/17 where:

- The offence is classified under Home Office crime class 86, which relates to ‘obscene publications’ (see Home Office, 2017a).
- The suspect/perpetrator was aged under 18 at the time of the offence.

In our example this would include the girl who photographed herself and sent the image to the boy (if she was recorded as a suspect), but not the boy who requested the image in the first place (as his was not a ‘sexting’ offence) unless he also had an allegation of ‘possession of an indecent image of a child’ recorded against him.²³ More broadly, it seems likely that the NPCC data will include cases that did not involve self-generated sexual imagery in the context of ‘sexting’, including what might commonly be understood as making, possessing or distributing ‘child pornography’ (child sex abuse images) by suspects under the age of 18. There is no specific offence of ‘sexting’, which is a popular rather than legal term.

22 If it progresses, that case is likely to set an important precedent and contribute to ongoing debates about the retention by police forces of fingerprints, DNA, custody images, body worn video and other personal data where no criminal justice sanction is applied.

23 This further underlines the complexity and ambiguity in these cases. If the boy had an allegation of making/possession of an indecent image of a child recorded against him, it would be counted in addition to the ‘sexual activity with a child’ allegation. The HOCC example seems to imply this would or should not take place (Home Office, 2017a).

The NPCC press release (NPCC, 2017) opens by asserting that there has been a:

‘...surge in children sharing or possessing sexual images of themselves or others – with over 6200 incidents reported this year – an increase of 131 per cent from 2014/2015.’

It then goes on to say that:

‘Reports come from children as young as ten with a peak in cases involving 14 year olds. Boys are as likely as girls to be recorded as suspects or perpetrators for sexting offences but girls are more likely to be recorded as victims; suggesting that boys are more likely to share images without consent.’

Given the way the law is structured it is not clear why consent is relevant, except insofar as images shared without consent may be a significant reason why they come to police attention.

In terms of outcomes, the NPCC press release clarifies that the 6,238 offences recorded in 2016/17 resulted in 2,079 being classified by ‘Outcome 21’, while only 63 young people were charged – although we aren’t told what they were charged with. We also know very little about the balance of 4,096 offences, beyond the following:

‘Other cases were not pursued as judged not to be in the public interest, had evidential difficulties or the victim did not support a prosecution. A proportion were also dealt with through out of [court] disposals.’

When we critically examine the reported statistics, several discussion points emerge.

- It is not known to what extent the reported ‘surge’ in crimes recorded by the police over the three-year period reflects a surge in actual offending. It is possible, for example, that the introduction of ‘Outcome 21’ and the reassurances given by police forces about a proportionate response have increased the confidence of victims or people acting on their behalf (such as parents and teachers) to report offences, or indeed of police forces to record allegations.
- It is not clear how many incidents and unique victims and suspects were involved in these 6,238 offences, for example given the amplification effect of distribution through social networks, but also potential ambiguity about victim status and crime counting rules.
- It is unclear whether the finding that the ‘peak in cases involving 14 year olds’ – presumably as suspects/perpetrators – bears any relation to the age profile of actual ‘sexting’ behaviours by children,

rather than patterns of reporting to the police, and we would need other data sources to understand this better.²⁴

- In respect of the NPCC finding that boys and girls are equally likely to be recorded as suspects, we have already seen that a boy or girl taking an image of themselves (even if they don't forward it) commits an offence and may therefore be considered a 'suspect', but that police forces could choose not to record them as such. Again, it is not clear how much we learn about the dynamics of this behaviour from the NPCC data. Nevertheless, the important contextual information that girls are apparently three times more likely than boys to be recorded as victims suggests they may be much more often the subjects of the images that come to police attention.
- It might be helpful to know more about the context for these offences, including the circumstances in which they were uncovered or reported. For example, what proportion were reported by schools, parents, or victims, and what proportion were detected in other ways – such as imagery found during the forensic examination of IT equipment and phones. Related, we don't know how many may have involved 'child pornography' offences, including imagery that was not self-generated or that was distributed for profit.
- We don't know from the published outcomes data which offences the 63 children were charged with, nor indeed what the outcome was for the roughly two-thirds of cases that didn't result in a charge or 'Outcome 21', including how many cases resulted in someone receiving a formal criminal record (including by having received a caution).

That adds up to considerable uncertainty and suggests a lot more work is required if police recorded crime data are to better inform our understanding of 'sexting' and the appropriate public policy responses.

Concluding thoughts and the case for changing the law

The world has moved on a long way since the Protection of Children Act was enacted in 1978. Today children are routinely handed responsibility for and control of technology that allows them a level of personal autonomy and interconnectedness that was unimaginable 40 years ago. That they may not always possess the maturity to use that technology responsibly is arguably hardly their fault, but we must also be alive to the times when children are exploited or knowingly act with malice, and the damage that they can do to themselves and their families, friends and peers. The police must find themselves at times in the uncomfortable position of trying to find a proportionate response to these issues without the benefit of a crystal ball, and it is fair to say that the police service and policy makers have been on something of a journey in recent years as they have sought to adjust to new social realities, particularly those accompanying digital technologies and social media.

In considering the interaction of the law and police crime recording and counting practices, it is hopefully clear that it is difficult to understand the nature of 'sexting' offences from the kind of data published recently by the NPCC. Such data require critical examination, and a full explanation of their limitations, caveats and any contextual evidence needed to interpret them, and it is to be hoped that these will be provided in future. There must be a particular concern that different crime recording practices, including around the use of 'victim' and 'suspect' labels, may result in data that are not comparable from one force to the next or over time, muddying the waters further.²⁵

As to the law, both as drafted and in application, it seems that the main ethical complexities can be understood to arise in the interaction of four factors:

- a. The law treats a child taking an intimate photo of themselves as a criminal act.
- b. Police assurances about the future disclosure of any allegations cannot be definitive, and guidance and judgements may change over time.

24 Survey research on the impact of pornography on children in the UK commissioned by the NSPCC and Children's Commissioner, which included questions on sexting, does not extend to this level of detail, nor does it cover onward circulation of others' images (Martellozzo et al., 2017). Evidence from Australian research sampling respondents from 13 to adulthood suggests that younger children (aged 13-15) were less likely to have sent or received 'sexts' than their older peers, but when they did it was more likely to involve multiple others (Lee et al., 2015).

25 Here it is notable that while other data sources – for example, bespoke surveys – may shed important light on the nature of 'sexting' behaviours including related offending, it is likely that only police recorded crime data will routinely provide insights into trends and be available at the level of police forces or indeed more locally.

- c. The desire to avoid deterring children or their representatives (including parents and schools) from reporting allegations of victimisation to the police in the first place where they would wish to do so.
- d. The clear obligation to safeguard children, including from exploitation and other harms.

It must at least be considered unfortunate that a and b both risk undermining c and d, and there may be a strong argument for establishing if this risk is not just hypothetical but also a real barrier to reporting and safeguarding.

There seems to be no alternative to ensuring the police service has considerable discretion to deal with a range of matters in these cases, notably around disclosure decisions, although clearer guidance may well be beneficial in relation to the how the roles of individuals are recorded by police forces, for example as victims or suspects.

We might, however, ask what the law would look like if drafted today, in the digital/smartphone era. It seems likely that it would not be very different, but that in respect of a *self-generated 'indecent' image* (ie a 'nude selfie') there *might* be some very narrowly framed exemptions so that it would not be an offence for a *child (under 18)*:

- a. To take or make an 'indecent' image of themselves in the first instance.
- b. To send it to someone if they want to, they are the subject, and the recipient has consented to receive it (unless the recipient is under 13²⁶).
- c. To possess an indecent image of another child, if it was sent to them willingly and consensually by the subject (unless that child was under 13).

On the other hand:

- d. It should continue to be an offence for an adult to possess indecent images of children²⁷.
- e. There remain important questions about how to contend with age disparities between children and the nature and severity of the imagery: for example, a 17-year-old possessing an image of a 13-year-old

performing a sexual act, sent to them willingly by the latter.²⁸

At the very least, these suggestions could form the basis for further discussion.

Overall, it seems that the emphasis should be on identifying and taking action in the case of any abuse, coercion, duress or exploitation by third parties, as has always been the express intention of the existing law, while also equipping children with the right information and skills to navigate their social worlds without endangering themselves or others. The questions of consent and free will may not be straightforward in many cases, and there will always be a tension between the need for legal clarity and the myriad situations to which the law may apply, but it is not clear that those challenges are sufficiently compelling to maintain the *status quo*.²⁹

In any case, there may be a moral argument that it is unreasonable to equip children, as they become sexually inquisitive and active, with smartphones and similar technologies and both expect them not to experiment and make mistakes, but then deal with the production of self-generated indecent imagery as a criminal matter – however 'proportionate' the outcome. The world has changed and perhaps the law should change too.

Taking together the legal and crime recording complexities identified in this paper, it seems reasonable to conclude that a *conceptual muddle* exists, from which a number of consequences flow. These include the conclusion that published crime data may not be a reliable guide to the nature and scale of 'sexting', including any trends, and that efforts to compare rates in different force areas, or over time, may be highly problematic. That in turn seems likely to pose important difficulties for those tasked with addressing 'sexting', whether through criminal justice processes or other means, and underlines the vital importance of non-police and criminal justice sources of data and insight to inform policy, but also the need to improve the consistency of police data where possible.

²⁶ The Sexual Offences Act 2003 states that children under 13-years-old cannot consent to sexual activity.

²⁷ We can imagine complications here, for example where a 17-year-old in possession of an indecent image of his/her 16-year-old boy or girlfriend, turns 18. An exception – for example if the adult received the image while under 18 – or at least guidance on a proportionate approach to such cases might be required, which might include reference to the age difference between the two parties.

²⁸ The Home Office guidance to the Sexual Offences Act 2003 makes it clear that 'It is not intended to prosecute two young people of a similar age for engaging in mutually agreed teenage sexual activity, unless it involves abuse or exploitation' (Home Office, 2004). Elsewhere, an age difference of less than two years is a possible defence in Scottish law where someone aged 16 or over engages in sexual activity (not involving penetration or oral sex) with someone who is under 16 (Section 39, Sexual Offences (Scotland) Act 2009).

²⁹ The question of consent applies in 'revenge porn' cases, although these are limited to adults (Criminal Justice and Courts Act 2015).

Finally, and perhaps as importantly, we might ask to what degree children and young people can be expected to understand and accept the law and current narratives about 'sexting', including when and how to seek help, when concepts like suspect and victim status can apparently be so ambiguous. A little more clarity all round would seem to be urgently required.

About the author

Gavin Hales is an associate fellow of the Police Foundation, having been the deputy director from 2014 to 2017 before moving overseas. Gavin has extensive experience of research and analysis on policing, crime and justice issues, including studies of police effectiveness, police governance, chief officer misconduct, the policing of drugs, gun crime, drugs markets and reoffending rates. He is a regular commentator on policing and crime policy matters, including on Twitter where he is @gmhales.

Author's acknowledgements

The author is grateful to a number of people for comments on earlier drafts of this paper, including Gareth Edwards (Norfolk Constabulary), Andy Higgins (The Police Foundation), Rick Muir (The Police Foundation) and Emily Setty (University of Surrey). All errors and omissions are the author's own.

References

- BBC (2015) Sexting boy's naked selfie recorded as crime by police. *BBC News Online*. 3 September. Available at: <http://www.bbc.com/news/uk-34136388>
- BBC (2017) Mum wins legal review over police keeping son's naked photo details. *BBC News Online*. 10 November. Available at: <http://www.bbc.com/news/uk-england-manchester-41945498>
- College of Policing (2016) *Briefing Note: Police action in response to youth produced sexual imagery ('Sexting')*. Version 1.0, November 2016. Available at: http://www.college.police.uk/News/College-news/Documents/Police_action_in_response_to_sexting_-_briefing_%28003%29.pdf
- Communications Act 2003 (c. 21) Section 127 *Improper use of public electronic communications network*. Available at: <https://www.legislation.gov.uk/ukpga/2003/21/section/127>
- Coroners and Criminal Justice Act 2009 (c. 25) Section 62 *Possession of prohibited images of children*. Available at: <https://www.legislation.gov.uk/ukpga/2009/25/section/62>
- Criminal Justice Act 1988 (c. 33) Section 160 *Possession of indecent photograph of a child*. Available at: <https://www.legislation.gov.uk/ukpga/1988/33/section/160>
- Criminal Justice and Courts Act 2015 (c. 2) Section 33 *Disclosing private sexual photographs and films with intent to cause distress*. Available at: <http://www.legislation.gov.uk/ukpga/2015/2/section/33>
- Criminal Justice and Immigration Act 2008 (c. 4) Section 63 *Possession of extreme pornographic images*. Available at: <https://www.legislation.gov.uk/ukpga/2008/4/section/63>
- Crown Prosecution Service (CPS) (no date, a) Legal guidance: Indecent Images of Children (IIOC). [Online]. Available at: http://www.cps.gov.uk/legal/h_to_k/indecent_images_of_children. [Accessed 28 November 2017].
- Crown Prosecution Service (CPS) (no date, b) Indecent Images of Children (IIOC): Which offence should be charged? [Online]. Available at: http://www.cps.gov.uk/legal/h_to_k/indecent_images_of_children/#a06. [Accessed 28 November 2017].
- Deloitte (2017) *State of the smart: Consumer and business usage patterns*. Global Mobile Consumer Survey 2017: UK Cut. London: Deloitte LLP. Available at: https://www.deloitte.co.uk/mobileuk/assets/img/download/global-mobile-consumer-survey-2017_uk-cut.pdf

Disclosure and Barring Service (2016) *GD8 – Youth Produced Sexual Imagery – Guidance for Disclosure*. GD8 QAF v9, issued December 2016. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/578979/GD8_-_Sexting_Guidance.pdf available via <https://www.gov.uk/government/publications/quality-assurance-framework-version-nine-qaf-v9>

Home Office (2004) *Children and Families: Safer from Sexual Crime. The Sexual Offences Act 2003*. London: Home Office. Available at: <http://webarchive.nationalarchives.gov.uk/+http://www.homeoffice.gov.uk/documents/children-safer-fr-sex-crime.html>

Home Office (2017a) *Home Office Counting Rules for Recorded Crime: Miscellaneous Crimes Against Society*. With effect from April 2017. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656793/count-crimes-society-nov-2017.pdf

Home Office (2017b) *Home Office Counting Rules for Recorded Crime: Crime Recording General Rules*. With effect from April 2017. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656791/count-general-nov-2017.pdf

Lee, M., Crofts, T., McGovern, A. and Milivojevic, S. (2015). Sexting among young people: Perceptions and practices. *in Trends & issues in crime and criminal justice* No. 508. Australian Institute of Criminology. <http://www.aic.gov.au/publications/current%20series/tandi/501-520/tandi508.html>

Martellozzo, E., Monaghan, A., Adler, J.R., Davidson, J., Leyva, R. and Horvath, M.A.H. (2017) “...I wasn’t sure it was normal to watch it...” *A quantitative and qualitative examination of the impact of online pornography on the values, attitudes, beliefs and behaviours of children and young people*. Revised version, May 2017. NSPCC, Children’s Commissioner and Middlesex University. Available at: <https://www.nspcc.org.uk/services-and-resources/research-and-resources/2016/i-wasnt-sure-it-was-normal-to-watch-it/>

National Police Chiefs’ Council (NPCC) (2017) Police dealing with rising number ‘sexting’ cases involving children. Press release, 6 November. [Online]. Available at: <https://news.npcc.police.uk/releases/police-responding-proportionately-to-rising-number-of-sexting-incidents>. [Accessed 28 November 2017].

Protection of Children Act 1978 (c. 37). Available at: <https://www.legislation.gov.uk/ukpga/1978/37>

Setty, E. (2016) ‘Youth sexting: replacing abstinence with ethics’. *Discover Society* Issue 39. [Online]. Available at: <https://discoversociety.org/2016/12/06/youth-sexting-replacing-abstinence-with-ethics/>. [Accessed 28 November 2017].

Sexual Offences Act 2003 (c. 42). Available at: <https://www.legislation.gov.uk/ukpga/2003/42/contents>

Sexual Offences (Scotland) Act 2009 (asp 9) Section 39 *Defences in relation to offences against older children*. Available at: <https://www.legislation.gov.uk/asp/2009/9/section/39>

UK Council for Child Internet Safety (2017) *Sexting in schools and colleges: Responding to incidents and safeguarding young people*. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/609874/6_2939_SP_NCA_Sexting_In_Schools_FINAL_Update_Jan17.pdf

© 2018: The Police Foundation

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, without the prior permission of The Police Foundation.

Enquiries concerning reproduction should be sent to The Police Foundation at the address below.

The Police Foundation
The Foundry
17 Oval Way
Kennington
London SE11 5RR

020 3752 5630

www.police-foundation.org.uk

Charity Registration Number: 278257

THE
POLICE
FOUNDATION

The UK's policing think tank