**Consensual teenage sexting and youth criminal records[[1]](#footnote-1)**

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**Legislation:** Criminal Justice Act 1998, Criminal Justice and Immigration Act 2008, Legal Aid, Sentencing and Punishment of Offenders Act 2012, Localism Act 2011, Police Act 1997, Protection of Children Act 1978, Rehabilitation of Offenders Act 1974 and Sexual Offences Act 2003

*Currently the law in England and Wales means that young people who engage in consensual teenage sexting are at risk of being charged with child pornography and indecency offences. Even where no formal action is taken, any investigation of such behaviour will be recorded on the young person’s criminal record where it may be disclosed in a way which impacts upon the young person’s future access to education, employment, travel, insurance and housing. This article will argue that it is critical to find a balance between children’s protection rights and their right to sexual self-determination.*

**Introduction**

‘Sexting’ refers to the sending or receiving of sexually explicit text messages including the digital recording of naked, semi-naked, sexually suggestive or explicit images and their distribution via mobile phone messaging, email or social network sites.[[2]](#footnote-2) The current laws in England and Wales mean that young people who engage in consensual teenage sexting are at risk of being charged with child pornography and indecency offences. As child pornography laws do not distinguish consensual teenage sexting from child pornography, these laws potentially expose both the sender and receiver of youth sexting to the risk of criminal prosecution, with consequent classification as a sex offender and a permanent criminal record for youthful sexual exploration and experimentation.

This article will consider the state of current legal responses to the practice of consensual sexting amongst teenagers. This article will not be arguing that there should be no protection for children in the context of sexting, child exploitation and the creation and distribution of child pornography. The law needs to protect young people from the unauthorised showing and distribution of pornographic images of children. However, remedies already exist for non-consensual sexting or exploitation such as laws which criminalise revenge porn, offences against indecency, stalking and harassment. It is also possible to bring an action for breach of privacy, breach of confidence, nuisance and sexual harassment. This article will argue that the criminal justice response to consensual teenage sexting which categorises young people who engage in sexting as producers and distributors of their own child pornography needs to be redrawn in a way which provides a more individualised approach to how adolescents who are exploring their sexuality are treated by the criminal justice system.

1. **The legal response to youth consensual sexting**

The age at which young people can lawfully consent to engage in sexual activity is currently 16 years in England and Wales. The laws governing the age of consent laws intended to protect children from sexual relations by criminalising all forms of sexual behaviour involving young people below the age of consent. Anyone who engages in sexual activity with a child younger than 16 years of age commits a criminal offence and will be subject to the penalties set out in the Sexual Offences Act 2003 unless they reasonably believed the young person was at least 16 years old.[[3]](#footnote-3) Home Office Guidanceissued with the Sexual Offences Act 2003 sought to reassure society that these laws are designed to protect children from abuse and exploitation and not to prosecute under-16s who have mutually consenting sexual activity:

Although the age of consent remains at 16, the law is not intended to prosecute mutually agreed sexual activity between two young people of a similar age, unless it involves abuse or exploitation.[[4]](#footnote-4)

The guidance suggests that it may be more appropriate for social welfare agencies rather than criminal justice authorities to take a lead role in the regulation of sexual behaviour between youths and that the criminal law should only be considered where the activity is also clearly coercive or manipulative.[[5]](#footnote-5) Thus, the 2003 Act aims to protect young people from sexual abuse, the use of force and coercion, incest or abuse of a relationship of authority and to avoid any risk that consensual teenage sexual exploration would result in criminal charges.

In England and Wales any creation or transfer of naked images of young people potentially constitutes a criminal act of possessing, transmitting, viewing or downloading indecent images of children under the Protection of Children Act 1978 and the Criminal Justice Act 1988. Section 1 of the 1978 Act made it an offence to take or make an indecent photograph of a child under 16 years of age and also criminalises distributing an indecent photograph of a child. Conviction of these offences carries a maximum 10 years’ imprisonment and a requirement to comply with the notification requirements set out in the Sex Offenders Act 1997, as amended by the Sexual Offences Act 2003. All convicted sex offenders must notify the police within three days of their conviction or release from prison. Failure to notify is an offence which can carry a term of imprisonment. Convicted sex offenders are required to notify the police if they change their name or address, and are also required to reveal any plans to travel outside the UK. Again, failure to comply is an offence. The police can photograph offenders every time they notify, and all police forces exchange information about the movements of such offenders using the national computerised database set up to facilitate this procedure. Those given a jail sentence of more than 30 months for sexual offending are required to notify indefinitely. Those imprisoned for between six and 30 months comply with the notification requirements for 10 years, or five years if they are under 18. Those sentenced for six months or less are subject to the notification requirements for seven years, or three and a half years if under 18. Those cautioned for a sexual offence must comply with the notification requirements for two years, or one year if under 18.

The Sexual Offences Act 2003 extended the reach of the 1978 Act by redefining the child as “all persons under 18” years of age, rather than 16. Therefore although 16 and 17 year olds can consent to engage in sexual activity (provided it is not incestuous or in the context of a relationship of authority), they will commit an offence if they take indecent photographs or make videos unless they are married or in an “enduring family relationship”.[[6]](#footnote-6) While the 2003 Act provides no guidance on what constitutes an “enduring family relationship”, it is clear that the young people must be at least living together.[[7]](#footnote-7) A brief sexual encounter such as a drunken one night stand was held in *R v DM* to fall outside the definition of an “enduring family relationship”.[[8]](#footnote-8) Young people under 18 years of age who engage in consensual sexting are therefore at risk of being charged with child pornography offences under the 1978 Act. There have been some attempts to alleviate the harshness of this, as there has been more generally in relation to the age of consent laws. Crown Prosecution Service guidance was issued in October 2016 about teenage sexting cases[[9]](#footnote-9):

… care should be taken when considering any cases of ‘sexting’ that involves images taken of persons under 18 years … Whilst 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, such as those involving exploitation, grooming or bullying.

The guidance suggests sexting between children or sharing of “youth produced sexual imagery” should not be routinely prosecuted and that most of these incidents be dealt with informally. Similarly, in November 2016 the College of Policing published a lead position document which advised that sexting was part of a natural propensity for young people to “take risks and experiment with their developing sexuality” and that criminalisation was potentially harmful to all individuals concerned.[[10]](#footnote-10) The document encourages police to actively take a common-sense approach. In cases where there is no evidence of “exploitation, grooming, profit motive, malicious intent or persistent behaviour”, it is considered by the College of Policing that no further action may be the most appropriate outcome. Offences involving self-generated images obtained with consent by other children will still be recorded by the police but may be dealt with differently. Police forces are recommended to consider that suitably experienced first responders, safer school officers or neighbourhood teams can provide an appropriate response that avoids stigmatising or criminalising children. Furthermore, in January 2016 the National Police Chief’s Council, the Home Office and the Disclosure and Barring Service agreed a new outcome code (outcome 21) for youth-produced sexual imagery in England and Wales.[[11]](#footnote-11) The police can choose to record that a young person has been found creating and sharing sexual images but it is recommended that taking formal action is not usually in the public interest. In 2016/17 2079 cases of young people producing sexual imagery were classified under Outcome 21.[[12]](#footnote-12)

1. **Youth consensual sexting and future criminal records**

While there is still a risk of prosecution as this guidance is not binding, nevertheless restricting the prosecution of young people in this context is a welcome development, however the mere existence of a recorded investigation without any discretion for the police to delete that record could have a significant and disproportionate impact on a child’s future. Even where no arrest takes place, any investigation by the police will be logged and details of the individuals involved and the nature of the allegations will be recorded on the police intelligence database.[[13]](#footnote-13) These records will remain for at least six years even where there have been no charges, arrests or formal interviews.[[14]](#footnote-14) Part V of the Police Act 1997 provides for different types of criminal record certificates to be issued. The Disclosure and Barring Service (DBS) processes requests for criminal record certificates and issues DBS certificates. A criminal record check at basic disclosure level is the lowest level of disclosure. It only contains details of unspent convictions and unspent conditional cautions. The length of time before a caution or conviction becomes spent is determined by the type and length of sentence. A spent childhood conviction will be removed from the Disclosure and Barring Service basic (or enhanced) certificate if 66 months have elapsed since the date of the conviction; and it is the person’s only offence; and it did not result in a custodial sentence; and it does not appear on the list of “exempt offences” which will never be removed from a certificate. Exempt offences include cautions or convictions for distribution of indecent images of children. This information can only be removed from the database in exceptional and rare cases.[[15]](#footnote-15) An Enhanced DBS check is a criminal record check at enhanced disclosure level and is the highest level required for positions that can involve caring for, training, supervising or being in sole charge of children or vulnerable adults. Any request for an enhanced DBS certificate in England and Wales will disclose both spent and unspent conviction and relevant police intelligence. Police intelligence, including non-conviction information such as reports to the police, is held on the Police National Database for a minimum of 6 years and can be retained until the subject’s 100th birthday.[[16]](#footnote-16) Thus any conviction, caution or investigation of consensual sexting between teenagers could restrict the young person’s future access to education,[[17]](#footnote-17) employment,[[18]](#footnote-18) travel,[[19]](#footnote-19) insurance[[20]](#footnote-20) and housing.[[21]](#footnote-21)

Instead of recognising sexting as an expression of the well-recognized adolescent need for sexual exploration, sexting is viewed by the English criminal justice system as an illegal activity, albeit one that may not result in a criminal charge but may still restrict the young person’s future life opportunities. The legal response to consensual teenage sexting is not concerned with the young person’s capacity to give meaningful consent to sexualised behaviour. Meaningful consent implies the attainment of capacities to reason and act autonomously as an independent, self-complete, self-determining being facilitating rational decision-making in the context of free will.[[22]](#footnote-22) Instead sexting is conflated with the sexual abuse of children. When drafting the Protection of Children Act 1978 and the Sexual Offences Act 2003, legislators did not envisage the phenomenon of sexting in which teenagers, and not adult sexual predators, took and distributed pictures of themselves. Instead the legislation was intended to “protect children from exploitation and degradation”.[[23]](#footnote-23) However, when young people consensually make and share sexual images of themselves, they may suffer severe legal and social consequences despite the absence of abuse, harm, degradation, exploitation or coercion in the taking and transmitting of the image to a willing and intended recipient. When adults consensually share explicit photos of themselves, such behaviour is not criminalised.

1. **Responding to the dangers associated with sexting**

The psychological and social risks of youth sexting have been identified as including increased likelihood of future risky sexual behaviour, suicide, humiliation, depression, substance abuse and ‘slut-shaming’.[[24]](#footnote-24) ‘Slut-shaming’ refers to a wide range of actions that stigmatises females for their behaviour, or appearance, which is considered to be sexually provocative or promiscuous. The harms associated with sexting usually arise only upon the further dissemination of the image to others beyond those for whom it was originally intended, rather than the act of sexting itself. Such non-consensual taking and/or distributing of photographs can be dealt with by various other means. The Criminal Justice and Courts Act 2015 criminalises ‘revenge porn’ by making it a criminal offence to disclose “private sexual photographs and films”.[[25]](#footnote-25) The disclosure must occur without the consent of everyone appearing in the photos or film and with the intention of causing individual distress. The surreptitious filming of private acts for the purpose of obtaining sexual gratification is the criminal offence of voyeurism as defined by section 67 of the Sexual Offences Act 2003. The Communications Act 2003 makes it a criminal offence to use a “public communications network” to send a message that is “grossly offensive or of an indecent, obscene or menacing character”.[[26]](#footnote-26) The Malicious Communications Act 1988 makes it a criminal offence to send communications that are indecent, grossly offensive, threatening or false where there is an intention to cause distress or anxiety to a victim.[[27]](#footnote-27) The Protection from Harassment Act 1997 criminalises any form of persistent conduct that causes another person alarm or distress.

The Children Act 1989 provisions offer an opportunity for the relevant authorities to consult about the best way forward in respect of a child who is about to be prosecuted for a sexual offence. In cases of non-consensual sexting it may be thought preferable to proceed by way of civil proceedings seeking a care or supervision order under the Children Act 1989, rather than to embark on a prosecution. The Children Act creates the opportunity to develop interventions which promote the health and wellbeing of all the young people involved and to encourage positive prosocial behaviour. The 1991 guidance on interagency working in child protection, *Working Together*, emphasises that in the case of children and adolescents who engage in sexually harmful behaviour involving other children, child protection procedures should be invoked, that is such children should be viewed primarily as children in need as defined in the Children Act 1989 rather than children at risk.[[28]](#footnote-28) Support for this approach can be found in *DPP v R*[[29]](#footnote-29) in which Hughes LJ commented in the High Court that:

‘… where … children are concerned there may often be better ways of dealing with inappropriate behaviour than the full panoply of a criminal trial. Even where the complaint is of sexual behaviour it ought not to be thought that it is invariably in the public interest for it to be investigated by means of a criminal trial, rather than by inter-disciplinary action and co-operation between those who are experienced in dealing with children of this age …’[[30]](#footnote-30)

It is also possible to bring a civil action for breach of privacy, breach of confidence, nuisance and sexual harassment. Given the plethora of legal responses, both criminal and civil, available to respond to the malicious distribution of private images, this raises the question of whether it is necessary to police and criminalise youth consensual sexting?

**Conclusion**

Young people have always explored their sexuality and shared these experiences with others. Sexting can therefore be seen as a novel facet of more traditional forms of sexual self-expression and adolescent’s socialisation.[[31]](#footnote-31) Although it is critical to have social and legal regulations to protect children from harm that genuinely addresses children’s need for protection, the current approach to regulating teenage sexuality disproportionately restricts young people’s sexual self-determination.The paradigm of adult sexual offences is being used as a framework to interpret the very different and *consensual* interpersonal interactions of adolescents.[[32]](#footnote-32) Using criminal laws which were designed to protect children from sexual exploitation and victimization are an inappropriately stigmatising way of responding to consensual sexual experimentation which punish youth sexual agency, marginalise the voice of young people and may limit the young person’s future life choices.

1. Many thanks to Dr Nicola Wake for her useful feedback on an earlier draft of this article. All opinions and errors remain the responsibility of the author. [↑](#footnote-ref-1)
2. T. Crofts, M. Lee, A. McGovern, S. Milivojevic *Sexting and young people* (Basingstoke: Palgrave, 2015), 4. [↑](#footnote-ref-2)
3. Section 9 Sexual Offences Act 2003. This reasonable belief does not apply where the victim is under 13 years of age. [↑](#footnote-ref-3)
4. Home Office *Guidance on the Sexual Offences Act 2003* (London: Home Office, 2003) para 72. See also Home Office *Children and Families: Safer from Sexual Crime – The Sexual Offences Act 2003* (London: Home Office Communications Directorate, 2004). [↑](#footnote-ref-4)
5. Home Office *Protecting the Public* (London: TSO, 2002). [↑](#footnote-ref-5)
6. Sexual Offences Act 2003, s 45. [↑](#footnote-ref-6)
7. Sexual Offences Act 2003, s 1A(1),(2). [↑](#footnote-ref-7)
8. [2011] EWCA Crim 2752. [↑](#footnote-ref-8)
9. Crown Prosecution Service, *Guidelines on prosecuting cases involving communications sent via social media* (London: HMSO, 2016). [↑](#footnote-ref-9)
10. College of Policing, *Briefing Note: Police action in response to youth produced sexual imagery (sexting)* (London: College of Policing, 2016). [↑](#footnote-ref-10)
11. J. Allan (ed.) *Crime outcomes in England and Wales: year ending March 2016, Statistical Bulletin HOSB 06/16* (London: Home Office, 2016). [↑](#footnote-ref-11)
12. National Police Chief’s Council *Police dealing with rising numb ‘sexting’ cases involving children* (London: NPCC, 2017). [↑](#footnote-ref-12)
13. Home Office *Home Office Counting Rules for Recorded Crime: Crime Recording General Rules* (London: Home Office, 2017). [↑](#footnote-ref-13)
14. Rehabilitation of Offenders Act 1974, as amended by the Criminal Justice and Immigration Act 2008; the Police Act 1997; the Police Act 1997 (Criminal Records Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200) and the Rehabilitation of Offenders Act (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013/1198) [↑](#footnote-ref-14)
15. S. Lipscombe, J. Beard, *Retention and Disclosure of Criminal Records* (London: UK Parliament, 2014). [↑](#footnote-ref-15)
16. The power for police to keep records on the Police National Database is contained in the National Police Records (Recordable Offences) Regulations 2000, SI No 2000/1139. [↑](#footnote-ref-16)
17. The University and College Admissions Service (UCAS) advises candidates to declare all unspent convictions and, for courses that lead to particular professions or occupations that are exempt from the Rehabilitation of Offenders Act (ROA) 1974, any spent convictions, cautions, reprimands or final warnings are also recommended to be declared. [↑](#footnote-ref-17)
18. The Rehabilitation of Offenders Act 1974, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and Police Act 1997, in the Police Act 1997 (Criminal Records Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200) and the Rehabilitation of Offenders Act (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013/1198). [↑](#footnote-ref-18)
19. To obtain a visa to travel to certain countries, notably the USA, travellers may be required to disclose criminal records. The Rehabilitation of Offenders Act 1974 does not apply to US visa law, so even spent convictions have to be disclosed. [↑](#footnote-ref-19)
20. Insurance companies are entitled to ask customers for details of unspent convictions and to take these into consideration during the application process. [↑](#footnote-ref-20)
21. The Localism Act 2011 empowered local authorities to exclude, by class, certain applicants they designate as “non-qualifying persons” for the purpose of their housing allocation schemes; this allows authorities to take into account past behaviour. [↑](#footnote-ref-21)
22. P. Alderson “Consent to children’s surgery and intensive medical treatment’ [1990] 17(1) *Journal of Law & Society* 52-56; M. Shildrick *Leaky bodies and boundaries: Feminism, postmodernism and (bio)ethics* (London: Routledge, 1997); M. Waites *The Age of Consent: Young People, Sexuality and Citizenship* (Hampshire: Palgrave Macmillan, 2005). [↑](#footnote-ref-22)
23. *R v Land* [1998] 1 Cr. App. R. 301. [↑](#footnote-ref-23)
24. E.G. Benotsch, D.J. Snipes, A.M. Martin, S.S. Bull “Sexting, substance use, and sexual risk behavior in young adults” [2013] 52(3). *Journal of Adolescent Health* 307–313. [↑](#footnote-ref-24)
25. Criminal Justice and Courts Act 2015, s 33. [↑](#footnote-ref-25)
26. Communications Act 2003, s 127. [↑](#footnote-ref-26)
27. Malicious Communications Act 1988, s 1. [↑](#footnote-ref-27)
28. Department of Health *Working Together under the Children Act 1989. A Guide to Inter-Agency Co-operation for the Protection of Children from Abuse* (London: HMSO, 1991). [↑](#footnote-ref-28)
29. [2007] EWHC 1842 (Admin). [↑](#footnote-ref-29)
30. Ibid at para 37. [↑](#footnote-ref-30)
31. S.W. Campbell, Y.J. Park, “Predictors of mobile sexting among teens: toward a new explanatory framework” [2014] 2 *Mobile Media Communication* 20; S. Angelides, “Technology, hormones and stupidity: the affective politics of teenage sexting” [2013] 16 *Sexualities* 665. [↑](#footnote-ref-31)
32. S. Angelides, “Technology, hormones and stupidity: the affective politics of teenage sexting” [2013] 16 *Sexualities* 675. [↑](#footnote-ref-32)