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Sexting in Hong Kong – A Complex Interplay between Young People, Technology and Law*

Abstract

Sexting is a complex issue, concerning the interplay between young people's exploration and representation of their developing sexuality and their use of new communication technologies to socialize in a digital age. Added to this complexity is the way in which the law deals with sexting by young people, with some jurisdictions allowing prosecution under child pornography laws while others have introduced measures to prevent the criminalization of young people. This article examines this complex interplay with a particular focus on Hong Kong. It reviews data on the practice and prevalence of sexting both overseas and in Hong Kong and explores why sexting is of legal concern. It then examines what legal responses are available for addressing sexting with a particular focus on child pornography laws. After discussing why it is undesirable to allow prosecution of young people who sext under child pornography laws the article considers alternative avenues to address sexting in Hong Kong. This includes a review of offences adopted in other jurisdictions as well as some offences recently proposed in Hong Kong by the Law Reform Commission and Security Bureau, and a consideration of non-legal responses.

Keywords: Sexting, children's rights, child pornography, image based abuse, youth justice, criminalization

I. Introduction

Sexting by young people has increasingly become a matter of public debate world-wide. It is a complex issue because it concerns the interplay of young people's exploration and representation of their developing sexuality, their use of new communication technologies and socialization in a digital age, and legal responses to these behaviours. Sexting is not a clearly defined concept and it

can encompass varied behaviours and motivations.¹ At its simplest, it may be defined as images or videos that have sexual characteristics and are created, stored, sent and received digitally, though mobile phone messaging Apps or through the internet on social networking sites, such as Facebook, MySpace, YouTube, Snapchat, TikTok, Twitter, etc.² These sexualized images and videos may be consensually taken and shared between friends or intimate partners to flirt or have fun with. Images taken consensually may also be distributed to others without consent for various reasons, such as to brag, to bully or for revenge (colloquially known as ‘revenge porn’). Even where there is apparent consent this may have been induced by individual pressure, peer pressure or socio-cultural pressure.³ There is also the possibility that images are taken without consent, such as ‘up-skirting’, or as a result of a sexual assault, and then distributed.⁴

Given the vagueness of the term and that sexting can occur in such varied settings, it is no surprise that views about sexting and what should be done about sexting vary enormously. Some see ‘devices such as smartphones and practices such as sexting’ as showing that society is ‘losing control over the actions of young people and the morals by which they live their sexual lives’.⁵ Others regard sexting as not a significantly new phenomenon; just that for young people, cyber space complements or replaces real world socialisation and exploration.⁶

Such wide variations in views mean that finding appropriate responses is fraught with difficulty. In some countries, charges have been brought against young people who sext under child pornography laws. This can have severe consequences for the young people involved, including heavy penalties, registration on sex offender registers and all the attendant ramifications that

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¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting* (Parliamentary Paper 230, 2013) [2.2.1].

² See, Joint Select Committee on Cyber-Safety, Parliament of Australia, *High Wire Act: Cyber Safety and the Young, Interim Report* (2011) [4.47]; Yara Barrense-Dias, André Berchtold, Joan-Carles Surís and Christina Akre, ‘Sexting and the Definition Issue’ (2017) 61 *Journal of Adolescent Health* 544.

³ Murray Lee and Thomas Crofts, ‘Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting Between Young People’ (2015) 55 *British Journal of Criminology* 454-473.

⁴ Law Reform Committee (n 1) [2.2.1].

⁵ Sander De Ridder, ‘Mediatization and sexuality: An invitation to a deep conversation on values, communicative sexualities, politics and media’ MEDIA@LSE Working Paper Series, 2017, 13 <<https://biblio.ugent.be/publication/8509213/file/8509214.pdf>> accessed 24 August 2020.

⁶ Emma Bond, ‘The mobile phone = bike shed? Children, sex and mobile phones’ (2011) 13 *New Media & Society* 587-604; Bryn Ostrager, ‘SMS. OMG! LOL! TTYL: Translating the Law to Accommodate Today’s Teens and the Evolution from Texting to Sexting’ (2010) 48 *Family Court Review* 712-726.

follow for their future education, employment and social opportunities. In response to concerns that prosecution of children under child pornography laws may be more harmful than beneficial to young people, some jurisdictions have created prosecutorial barriers and/or defences for young people involved in sexting, modified penalties or created offences specifically to address the non-consensual distribution of intimate images.

In Hong Kong, there has, however, been little discussion of law reform in this area. In 2019, the Law Reform Commission of Hong Kong ('Commission') published two reports recommending the introduction of offences which could have an impact on sexting by young people. One report issued by the Commission in April 2019 identified the need for new offences to address voyeurism and non-consensual 'up-skirt' photography.⁷ Another report, from December 2019, recommended offences to cover causing a child to look at a sexual image.⁸ More recently, the Security Bureau published a report in January 2021, following a consultation paper issued in July 2020, noting that the Government accepts the recommendations of the Commission for the introduction of offences to cover voyeurism and upskirting. This report also notes that the Government plans to go further and introduce new offences relating to non-consensual photography of intimate parts.⁹ However, none of these reports specifically investigated sexting by young people, nor addressed in detail the impact that existing or the recommended offences might have on such behaviours.

This article aims to address the paucity of information and debate about sexting and the laws that can, and should, apply to young people in Hong Kong. It begins with an examination of the practice and prevalence of sexting both overseas and in Hong Kong. This is followed by discussion of some of the issues that sexting raises and why it is of legal concern. The article then evaluates what legal responses are available, focusing on child pornography offences. While noting that at present there is no evidence that young people are being prosecuted under such laws for sexting, the article examines how changes to policing practices in Hong Kong could open the door to prosecution of

⁷ Law Reform Commission of Hong Kong, *Voyeurism and Non-consensual Upskirt-photography, Report* (April 2019) <https://www.hkreform.gov.hk/en/docs/rvoyeurism_e.pdf> accessed 24 August 2020.

⁸ Law Reform Commission of Hong Kong, *Review of Substantial Sexual Offences, Report* (December 2019), paragraphs [3.89]-[3.96] and Final Recommendation 14 at 60 <https://www.hkreform.gov.hk/en/publications/rsubstantive_sexual_offences.htm> accessed 24 August 2020.

⁹ Security Bureau, Legislative Council, *Report on the Consultation on Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences* (January 2021), [1.07]-[1.08] <https://www.sb.gov.hk/eng/special/voyeurism/Consultation_Report_on_Voyeurism_Eng.pdf> accessed 18 January 2021.

young people. After discussing why charges should not be brought under child pornography laws for young people who engage in sexting the article considers alternative avenues to address sexting in Hong Kong. Alongside offences adopted in other jurisdictions to specifically deal with image-based abuse this article reviews the offences recommended by the Commission and Security Bureau to assess their suitability to address sexting that is non-consensual and exploitative. In recognition that criminal law responses alone are not suitable for all forms of sexting (particularly where sexting is consensual), this article considers the need for non-legal responses, which focus on education as well as alternative administrative mechanisms to combat non-consensual sexting.

II. Prevalence of Sexting

Sexting is a somewhat recent phenomenon as a result, reporting of the extent of sexting in academic literature varies widely.¹⁰ It is likely that sexting will continue to rise because of increases in access to technology,¹¹ especially Snapchat,¹² the growing use of communication technologies to socialize and a greater acceptance of sexting as a mode of communication amongst younger people.¹³ In order to contextualize the discussion about sexting and why it is an issue of legal concern, this section provides a snapshot of the available research on the prevalence of sexting by young people both overseas and in Hong Kong.

One of the earliest studies of US teenagers in 2009 found that about 4% had sent nude or semi-nude images by cell phone and around 15% had received them in this medium.¹⁴ As the study was limited to cell phone communications, this is regarded as a fairly conservative figure. A more recent US nationwide study of 5,593 students in middle and high school aged between 12 and 17-

¹⁰ Kam Kosenko, 'Sexting and Sexual Behaviour, 2011-2015: A Critical Review and Meta-analysis of a Growing Literature' (2017) 22 *Journal of Computer-mediated Communications* 141, 141-142.

¹¹ Robert Weiss and Charles P Samenow, 'Smart Phones, Social Networking, Sexting and Problematic Sexual Behaviors—A Call for Research' (2010) 17 *Sexual Addiction & Compulsivity* 241-246; VC Strasburger, H Zimmerman, JR Temple and S Madigan 'Teenagers, Sexting, and the Law' (2019) 143(5) *Pediatrics*: e20183183.

¹² Joris Van Ouytsel, Ellen Van Gool, Michel Walrave, Koen Ponnet and Emilie Peeters, 'Sexting: Adolescents' Perceptions of the Applications Used For, Motives For, and Consequences of Sexting' (2017) 20 *Journal of Youth Studies* 446, 448.

¹³ Kosenko (n 12) 142.

¹⁴ Kaitlin Lounsbury, Kimberly Mitchell and David Finkelhor, Crimes Against Children Research Centre, 'The True Prevalence of "Sexting"' (April 2011) 1, 3

<https://www.researchgate.net/publication/259148923_The_True_Prevalence_of_Sexting> accessed 24 August 2020.

years-old carried out between August to October 2016, reported that 12.8% of respondents had sent a sext, while 18.5% had received one.¹⁵

One of the first studies conducted in Australia in 2013 surveyed over 2,000 respondents by self-selection. It found significantly higher rates of prevalence. Of those surveyed, around 49% had sent sexual images or videos of themselves and 67% had received such images.¹⁶ Another nationwide Australian study was conducted by Milton et al of 1,400 Australians aged 16-25 in both 2012 and 2014.¹⁷ This study included a survey of two-way sexting,. Namely, that the respondents ‘had sent and received sexts’.¹⁸ It found that 42.21% engaged in two-way sexting in 2014, up from 38.06% in 2012.¹⁹ It further found that 16.93% of respondents had ‘[s]ent someone a photo or video showing yourself nude or nearly nude’.²⁰

In 2015, Wood and others²¹ published an article relating to a project that conducted a survey of school children, aged between 14 and 17, in five European countries on a number of matters including questions relating to sexting between those engaged in a relationship, or after its breakup. Of the 277 school children who participated in this part of the survey, 38% stated that they sent a sexual image,²² and 48% stated that they had received a sexual image.²³

As part of a broader 2017 UK survey carried out jointly by two organizations, Brook and CEOP, 2,135 young people aged between 14-24 were asked if they had: ‘Sent a sexual or nude photo to someone they were interested in’.²⁴ It was found that 34 percent of respondents had sent such a

¹⁵ James W Patchin and Sameer Hinduja, ‘The Nature and Extent of Sexting Among a National Sample of Middle and High School Students in the US’ (2019) 48 Archives of Sexual Behaviour 2333-2343, 2337.

¹⁶ Thomas Crofts, Murray Lee, Alyce McGovern and Sanja Milivojevic, *Sexting and Young People* (Palgrave Macmillan 2015) 107.

¹⁷ Alysa C Milton, Benjamin A Gill, Tracey A Davenport, Mitchell Dowling, Jane M Burns and Ian B Hickie, ‘Sexting, Web-based Risks, and Safety in Two Representative National Samples of Young Australians: Prevalence, Perspectives, and Predictors’ (2019) 6(6) JMIR Mental Health 3.

¹⁸ *ibid*, 4

¹⁹ *ibid*.

²⁰ *ibid*.

²¹ Marsha Wood, Christine Barker, Nicky Stanley, Nadia Aghtaie and Cath Larkins, ‘Images Across Europe: The Sending and Receiving of Sexual Images and Associations with Interpersonal Violence in Young People’s Relationships’ (2015) 59 Children and Youth Services Review 149-160.

²² *ibid*, 154.

²³ *ibid*, 155.

²⁴ Ester McGeeney and Elly Hanson A research project exploring young people’s use of technology in their romantic relationships and love lives. National Crime Agency and Brook (2017) 12 <http://legacy.brook.org.uk/data/DR_REPORT_FINAL.pdf> accessed on 24 August 2020).

message and 52% had received an image of someone else. For those aged between 14-17, 26% stated that they had sent an message to someone they were interested in and 48%, had received an image from someone they were interested in ‘of someone else’.²⁵

A report by SWGFL/UK Safer Internet Centre, University of Plymouth, United Kingdom, Netsafe, New Zealand, Office of the Safety Commissioner, Australia in 2017 summarized findings from the UK, New Zealand and Australia.²⁶ In relation to the UK, 681 school children answered the quantitative element of the survey.²⁷ The sexting part of the survey was directed at identifying whether respondents had ‘knowledge of peers sharing self-generated images’.²⁸ The study revealed that 49% of those surveyed reported knowledge that their peers had shared images which were self-generated.²⁹ These statistics were broken down into further categories, including knowledge of a ‘few’ occurrences in the ‘past year’ (being 19% of those surveyed) and that it ‘happens’ all the time (amounting to 12% of the surveyed population).³⁰ Prevalence rates were considerably lower in New Zealand with around 4% of teens and 7% of older teens aged 17 years old reporting they had ‘shared a nude or nearly nude of themselves in the last 12 months’.³¹ However, much higher rates of teens reported being asked to send ‘nudes’ (1 in 5 teens) or knowing someone who had shared ‘nudes’ (4 in 10 teens).³² In relation to Australia, much higher rates were recorded with almost 1 in 3 young people aged 14-17 years of age reporting having ‘some experience with sexting’ and around 9 out of 10 14-17 year olds reporting that they ‘thought that sexting happened among their peers’.³³

²⁵ *ibid.*

²⁶ SWGFL/UK Safer Internet Centre, University of Plymouth, United Kingdom, Netsafe, New Zealand, Office of the Safety Commissioner, Australia, *Young People and Sexting-Attitudes and behaviours : Research Findings from the United Kingdom, New Zealand and Australia* (December 13, 2017), available at <<https://www.esafety.gov.au/sites/default/files/2019-07/Young%20people%20and%20sexting-netsafe-UK%20Safer%20Internet%20Centre-Plymoth%20University-eSafety%20Commissioner.pdf>> accessed 24 August 2020.

²⁷ *ibid.*, 4.

²⁸ *ibid.*, 5.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.*, 11.

³² *ibid.*

³³ *ibid.*, 14.

In A recent study of over 3,000 adolescents in Hong Kong published in 2018 found that 7.2% of teenagers in secondary years 1-6 had sent sexts and 26.3% had received sexts.³⁴ Another Hong Kong study, being a survey conducted by questionnaire of 381 psychology students at a Hong Kong tertiary institution found higher rates of sending sexts.³⁵ Participants in the study were aged between 17-24 years-old.³⁶ It found, out of the sample polled, that 18.06% of males and 9.70% of females (12.86% in total) had sexted images of nude or sexually explicit photos of themselves with a sexual connotation or an intention to arouse.³⁷ Factors influencing these gender disparities were the more positive attitude toward sexting, the greater subjective norm (or perception of acceptability of this practice by those whose opinions are important to the performer) and increased perceptions of behavioural control (or skill in carrying out these tasks) by men.³⁸ The authors surmise that these factors are consistent with perceived traditional double standards about liberal sexual practices between men and women in Hong Kong.³⁹

These findings broadly align with a meta-analysis of worldwide studies conducted in 2016 which found that between 2.5%-36.4% of adolescent respondents in these studies communicated sexually explicit photographs via some form of technology.⁴⁰ Another large-scale meta-analysis of 39 studies of sexting conducted before 2017 across various countries found that 14.8% had sent and 27.4% had received a sext.⁴¹ While data from individual countries varies these studies show that sexting is something which is not uncommon among young people and it appears that there may be a comparative upward trend in sexting.⁴²

III. Legal Issues Raised by Sexting

³⁴ P Ip, CKM Lo and RSM Wong, *Cyberbullying: Risk Factors and Consequences From a Health Perspective* (4 September 2018) PowerPoint Slide 27 <www.lawtech.hk/cyberbullying2018_/wp-content/uploads/2018/ptt/Patrick.pdf> accessed 24 August 2020.

³⁵ Mario Liong and Grand H L Cheng, 'Sext and Gender: Examining Gender Effects on Sexting Based on the Theory of Planned Behaviour' (2017) 36(7) *Behaviour and Information Technology* 726-736.

³⁶ *ibid*, 729.

³⁷ *ibid*, 729,730.

³⁸ *ibid*, 727 and 731.

³⁹ *Ibid*, 731-732.

⁴⁰ EL Courtice and K Shaughnessy, 'Technology-Mediated Sexual Interaction and Relationships: Systemic Review of the Literature' (2017) 32(3-4) *Sexual and Relationship Therapy* 269, 279.

⁴¹ S Madigan, A Ly, CL Rash, J Van Ouytsel J and JR Temple JR, 'Prevalence of multiple forms of sexting behavior among youth: a systematic review and meta-analysis' (2018) 172(4) *JAMA Pediatrics* 327-335. For discussion of other research collaborating these findings see Strasburger, Zimmerman, Temple and Madigan (n 13) 2.

⁴² Strasburger, Zimmerman, Temple and Madigan (n 13) 3.

While the available studies suggest that sexting is not a marginal practice among young people overseas or in Hong Kong, views about sexting vary enormously. A dominant standpoint is that sexting is associated with risky behaviour and inherent negative implications.⁴³ As such much of the mainstream discussion has tended to focus on harmful outcomes that may stem from young people engaging in sexting.⁴⁴ One of the earliest articles on sexting published with the title, ‘The Dangers of Teen Sexting’ in *Psychology Today* exemplifies this approach:

Engaging in sexting is a dangerous activity for teens! It can have adverse side effects and the consequences can be life-long. ...Plus, according to research those teens who are sexting or propositioned to send a sext are more likely than their peers to have sexual intercourse.⁴⁵

This quote summarises some of the negative associations made in relation to young people sexting. The concern is that young people may not be mature enough to appreciate the implications of disseminating sexualized images of themselves online and leaving a digital footprint which can affect future relationship, educational and employment prospects.⁴⁶ There is also the concern that sexting is connected with other risky sexual behaviours.⁴⁷

While such research appears to rely heavily on hetero-normative assumptions about what amounts to risky behaviours, the fact that there may be a connection between sexting and sexual exploration is unsurprising. It is quite likely that young people who sext are doing this as a way of exploring their sexuality and may well be sexually active. However, whether there is a *casual* link between sexting and sexual behaviour is not clear. A longitudinal study of the relationship between sexting and sexual behaviour conducted by Temple and Choi found that ‘sexting may precede sexual intercourse in some cases [which] is consistent with the notion that sexting may serve as a prelude or gateway behavior to actual sexual behaviors, or as a way to indicate one’s readiness to take

⁴³ For discussion see Lee and Crofts (n 3).

⁴⁴ For discussion see Crofts, Lee, McGovern and Milivojevic (n 22); Alyce McGovern and Murray Lee ‘A Sexting ‘Panic’? What We Learn from Media Coverage of Sexting Incidents’ in Michel Walrave, Joris Van Ouytsel, Koen Ponnet, Jeff R Temple (eds), *Sexting: Motives and risk in online sexual self-presentation* (Palgrave Macmillan 2018) 99-118.

⁴⁵ Raychelle Lohmann, Dangers of Teen Sexting, *Psychology Today* 2012 <<https://www.psychologytoday.com/us/blog/teen-angst/201207/the-dangers-teen-sexting>> accessed 24 August 2020.

⁴⁶ For discussion, see Crofts, Lee, McGovern and Milivojevic (n 22).

⁴⁷ See, for example, Joseph Dake, James Price, Lauren Maziarz and Britney Ward, ‘Prevalence and Correlates of Sexting Behavior in Adolescents’ (2013) 7 *American Journal of Sexuality Education* 1-15.

intimacy to the next level'.⁴⁸ Nonetheless, Temple and Choi did not report a relationship connecting sexting to risky sexual behaviour.⁴⁹

The negative association between sexting and risky behaviours may, to an extent, be ideologically driven. Adults do not like to think of young people having and expressing sexual desires.⁵⁰ Often in the public imagination young people are conceived of as lacking experience and sexual desires and therefore it can be 'difficult for some to conceptualise the transition to the activity and knowledge of adulthood. And this is especially so concerning *sexual* activity and knowledge'.⁵¹

Another standpoint is that sexting is not a completely new type of behaviour inexorably connected with harm. Researchers holding this view note that young people have always experimented and explored their sexuality, but they can now do so through new media. Bond finds that a difference between experimentation before the advent of new technology and sexting is the location where romantic explorations occur. Instead of taking place in 'real space' (e.g. behind the bike shed), today they take place in 'virtual space'.⁵²

It has also been argued that sexting can be experienced positively by young people. Young people can explore and express themselves safely in cyber-space without being exposed to the potential negative risks associated with 'real' life experimentation with sexuality. New communication technologies give young people a platform unconstrained by traditional views about sexuality. In this space they are free to assemble their own paradigms of sexuality.⁵³ Sexting can allow young people to take control of this aspect of their lives. Indeed, research by Crofts et al., found that sexting by young people is largely motivated by a desire to be 'fun and flirty', to give 'a sexy present' and to 'feel sexy and confident'.⁵⁴ Similarly, research by McGeeney and Hanson has also found that young people are motivated to sext by a range of factors including to flirt and have 'fun with friends', for 'sexual enjoyment and intimacy as part of a relationship' and 'body

⁴⁸ Jeff Temple and HyeJeong Choi 'Longitudinal association between teen sexting and sexual behavior' (2014) 135 *Pediatrics* 1287-1292, 1291.

⁴⁹ *ibid*, 1291.

⁵⁰ Stevi Jackson, *Childhood and Sexuality* (Blackwell, 1982), 3.

⁵¹ Joanne Faulkner, 'Vulnerability and the passing of childhood in Bill Henson: innocence in an age of mechanical reproduction' (2011) 11 *Parrhesia* 53, n 11.

⁵² Bond (n 6).

⁵³ Brian Simpson, 'Challenging childhood, challenging children: Children's rights and sexting' (2013) 16 *Sexualities* 690-709.

⁵⁴ Crofts, Lee, McGovern and Milivojevic (n 22).

confidence'.⁵⁵ Other research also corroborates these results and confirms that sexting is most often done consensually with only a small minority of young people reporting feeling coerced into sexting.⁵⁶ Accordingly, it appears that there is a 'greater acceptance among teens of pursuing sexual intimacy online'⁵⁷ and that sexting is becoming part of the normal ad hoc early experiential sexual activities of young people.

This is not to say that even when images are taken and shared consensually for fun and to flirt, and there are no issues of overt coercion or direct exploitation, there are no risks and harms. A young person may feel panic, regret and shame even after consensually sharing an image.⁵⁸ Sexting can also give rise to technologically facilitated abuse and its associated harms.⁵⁹ Indeed, sexting has been linked with cyber-bullying, especially where images are sent (and sometimes even taken) without consent in order to intimidate, harass or coerce a young person.⁶⁰

There is clearly an overlap between sexting and cyber-bullying which must be taken seriously, but the connection should not be overstated. Research by Lee et al, suggests that most sexting occurs within some form of relationship.⁶¹ Only few respondents noted feeling pressured to sext or had a negative experience associated with sexting.⁶² Sharrat's 2019 study, part of which was directed at identifying the extent of intimate image abuse amongst those aged under 18 in England, reported

⁵⁵ McGeeney and Hanson (n 32) 12. Other factors noted include pressure from friend or partner and getting back at someone.

⁵⁶ See Strasburger, Zimmerman, Temple and Madigan (n 13) 3, with further references.

⁵⁷ *ibid.*

⁵⁸ Joint Select Committee (n 2) [4.60]; Sue Murray, 'Safeguarding Children and Young People in the Online Environment' Safeguarding Implications of Texting and Associated Online Behaviour, *Journal of Nursing Research and Practice* (May 2018) 3 <<https://www.pulsus.com/scholarly-articles/safeguarding-children-and-young-people-in-the-online-environmentsafeguarding-implications-in-respect-of-sexting-and-associated-onl-4517.htm>> accessed 24 August 2020).

⁵⁹ See for example Anastasia Powell and Nicola Henry, 'Sexual violence and harassment in the digital era' in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan 2017) 205-220.

⁶⁰ See, for example, Ilan Katz, Matthew Keeley, Barbara Spears, Carmel Taddeo, Teresa Swirski, Shona Bates, *Research on youth exposure to, and management of, cyberbullying incidents in Australia, synthesis report*, Social Policy Research Centre 2014 <https://yla.org.au/wp-content/uploads/2018/09/Cyberbullying_Research_Report_-_Synthesis.pdf> accessed 24 August 2020.

⁶¹ Murray Lee, Thomas Crofts, Alyce McGovern, Sanja Milivojevic, 'Sexting among young people: Perceptions and practices', *Trends & Issues in Crime and Criminal Justice*, no 508 (2015); see also Kimberly Mitchell, David Finkelhor, Lisa Jones and Janis Wolak, 'Prevalence and Characteristics of Youth Sexting: A National Study' (2012) *Pediatrics* 13-20.

⁶² Lee, Crofts, McGovern and milivojevic (n 73); see also Strasburger, Zimmerman, Temple and Madigan (n 13) 3.

similar findings.⁶³ For this research, data was collected from the Professional Online Safety Helpline (POSH). The researchers found that only 4% of cases referred to POSH related to intimate image abuse,⁶⁴ being the non-consensual sharing of a person's intimate images.⁶⁵ Also, none of these cases took place within 'a long-term relationship'.⁶⁶

Even though only low numbers in the Lee et al and Sharratt studies reported being pressured or coerced into sexting, it is important to note that a person, particularly a young person, may not disclose coercion either because of fear or a lack of awareness.⁶⁷ Lack of reporting may also be due to a failure by professionals to diligently follow up on peer to peer abuse.⁶⁸ Coercion can also be difficult to recognize because it can take many forms. Alongside direct pressure from a friend or romantic partner, young people may be subjected to peer or societal pressures which may be more prevalent and less overt.⁶⁹ Such pressures have a gendered dimension, where there is pressure to engage in sexting, it is more often directed at young women.⁷⁰

Furthermore, there is a gendered-double standard in attitudes about those who send sexts, with young women being more likely to be shamed and viewed more negatively than young men who send sexts.⁷¹ In this regard, there is also a broader concern that on-line social networking is increasingly shaped by 'porno-discourses'⁷² which reproduce and reinforce ideas of young women as 'commodified' sexual objects. This can perpetuate young women's experiences of "everyday"

⁶³ Elena Sharratt, Intimate image abuse in adults and under 18s A comparative analysis of cases dealt with by the Revenge Porn Helpline and Professionals Online Safety Helpline, 2019, 5
<<https://swgfl.org.uk/assets/documents/intimate-image-abuse-in-adults-and-under-18s.pdf>> accessed 24 August 2020.

⁶⁴ *ibid*, 23.

⁶⁵ *ibid*, 7.

⁶⁶ *ibid*, 31-32.

⁶⁷ *ibid*.

⁶⁸ *ibid*.

⁶⁹ Lee and Crofts (n 3).

⁷⁰ *ibid*.

⁷¹ Jessica Ringrose, Laura Harvey, Rosalind Gill, Sonia Livingstone, 'Teen girls, sexual double standards and "sexting": gendered value in digital image exchange' (2013) 14 *Feminist Theory* 305-323.

⁷² Jessica Ringrose, 'Sluts, whores, fat slags and playboy bunnies: Teen girls negotiations of "sexy" on social networking sites and at school' in C Jackson, C Paechter, E Renold (eds) *Girls and Education 3-16: Continuing concerns, new agendas* (Open University Press 2010) 170-182,171.

intrusions, routine sexual harassment and sexual assaults in public spaces'.⁷³ These pressures and gendered harms can impact on how young women engage in the online environment.⁷⁴

Another concern is that sexting can be seen to enable adult sexual abuse of young people. The availability of sexualized images of children on social media may 'whet the appetite' of abusers and feed their fantasies.⁷⁵ Images may also be used to groom young people,⁷⁶ or procure sexual acts by threatening to spread the compromising images online if the victim does not give in to sexual demands of the offender (labelled 'sextortion').⁷⁷

While it is clear that sexting is not necessarily a harmful practice, it is the associations of sexting with negative risks for individuals and society that have tended to stand in the way of reforms to remove young people engaging in sexting from the reaches of criminal law. This means that young people are liable to prosecution in many jurisdictions, including Hong Kong, for child pornography and other offences. Exposing young people to the threat, and reality, of prosecution can present a greater harm than the behaviour itself.⁷⁸

This raises the question of whether the current legal options are appropriate for addressing sexting behaviours. The following section examines the criminal offences that are available to prosecute young people for sexting, focusing on child pornography offences, both overseas and in Hong Kong. The appropriateness of utilising these offences is assessed before considering potential law reform.

IV. Current Legal Responses to Sexting

A. Child pornography offences

⁷³ Anastasia Powell and Nicola Henry, *Sexual Violence in a Digital Age* (Palgrave Macmillan 2017) 25.

⁷⁴ *ibid* 24.

⁷⁵ See *R v Schultz* (2008) 450 AR 37.

⁷⁶ *Osborne v Ohio* (1990, 495 US 103), where the Court referenced evidence suggesting that child pornographic materials are used to entice young people into sexual behaviour, 111.

⁷⁷ Ethel Quayle, *Over the Internet, Under the Radar: Online Child Sexual Abuse and Exploitation – A Brief Literature Review* (February 2017) 22-23 <<https://cycj.org.uk/wp-content/uploads/2017/02/Over-the-Internet-literature-review.pdf>> accessed 24 August 2020. An example in Hong Kong is *HKSAR v Wong Dawa Norbu Ching Shan* [2013] HKDC 853.

⁷⁸ Murray Lee and Thomas Crofts, 'Harms and Alarms: A Zemiological Analysis of Sexting by Young People' in Kate Gleeson and Catharine Lumby (eds) *The Age of Consent: Young People, Sexual Abuse and Agency* (UWA Publishing 2019) 49-64.

Young people who sext can fall foul of several criminal offences,⁷⁹ the most severe of which are child pornography offences. These offences form the basis of the following discussion not only because of their severity but also because these offences appear to be most commonly used, or debated, to address sexting by young people.

In many jurisdictions, young people who create, possess or distribute an image of a naked child (even an image of themselves) can be prosecuted for offences of child pornography (some jurisdictions label these child abuse or child exploitation material offences). This is largely because jurisdictions around the world have expanded the definition of child pornography in response to growing understanding about the nature of paedophilia, what images are of interest to paedophiles,⁸⁰ and concerns about the how new technologies are thought to be fuelling child pornography.⁸¹

In 2000, the United Nations adopted an ‘Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography’, which expressed concern ‘about the growing availability of child pornography on the Internet and other evolving technologies’.⁸² This Protocol called on State Parties to expand the definition of child pornography to encompass ‘any representation ... of a child engaged in real or simulated sexual activities or any representation of the sexual parts of a child for primarily sexual purposes’.⁸³

The laws covering child pornography in Hong Kong align with the Optional Protocol. The Prevention of Child Pornography Ordinance (Cap.579) (‘PCPO’), enacted in 2003, criminalizes the printing, making, producing, reproducing, copying, importing, exporting, publishing or possessing of any child pornography as well as indications that a person has published, publishes or intends to publish any child pornography.⁸⁴ This definition covers pornographic

⁷⁹ For example, in Hong Kong: Offences in connection with telephone calls or messages or telegrams, s 20 Summary Offences Ordinance Offences (Cap 228); Indecent conduct towards child under 16, s 146 Crimes Ordinance (Cap 200); Use, procurement or offer of persons under 18 for making pornography or for live pornographic performances, s 138A Crimes Ordinance (Cap 200) .

⁸⁰ See Max Taylor and Ethel Quayle, *Child pornography: an internet crime* (Routledge 2003) 193.

⁸¹ Concerns were expressed at the International Conference on Combating Child Pornography on the Internet held in Vienna in 1999, see UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, A/RES/54/263 of 25 May 2000.

⁸² *ibid.*

⁸³ *ibid.*, Art 2(c).

⁸⁴ PCPO, s 3.

depictions of a person under 16 whether a real person or not, and can include images that have been modified. A pornographic depiction includes:

- (a) a visual depiction that depicts a person as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such conduct; or
- (b) a visual depiction that depicts, in a sexual manner or context, the genitals or anal region of a person or the breasts of a female person, but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph.⁸⁵

The definition is designed to be broad enough to capture not only images of children engaged in sexual behaviour but also images that could be relatively innocent but are sexualized by the viewer. The requirement that the depictions showing the genitalia etc. of a child in a sexual manner or context is not likely to act as a legal barrier to the prosecution of young people who sext. Similarly, the clarification that pictures for a genuine family purpose are excluded from the definition of child pornography is unlikely to be satisfied where a young person sexts. The Second Reading Speech, on the PCPO, not surprisingly, did not envisage teen sexting.⁸⁶

In relation to sentencing for offences under the PCPO, the HK Court of Appeal noted in *Secretary for Justice v Ho Yan Kiu*,⁸⁷ that a training centre order was appropriate where the offender was aged under 21 at the time of conviction.⁸⁸ This suggests that courts have a degree of flexibility with sentencing for younger offenders, but the possibility of some type of custodial sentence is not ruled out. It was also noted that the offence applies in relation to children under 16 and no mention

⁸⁵ PCPO, s 2.

⁸⁶ Quoting from the Legislative Council, Official Record of Proceedings, Wednesday, 23 January 2002 at 3285-3286: 'Moreover, as children under the age of 16 are considered more vulnerable for they may not be able to make independent decisions and give informed consent. We therefore consider that the level of protection for children under 16 should be higher than that for those aged from 16 to 18. To differentiate between the protection for these two age groups, we propose that the use, procurement or offer of a person aged from 16 to 18 is an offence if the subject pornography or pornographic performance is a pornographic depiction depicting in a sexual manner or context the genitals or anal region of a person or the breast of a female person. If children under the age of 16 are depicted, even if the depiction only depicts in a sexual manner or context the relevant body parts, it is an offence.'

⁸⁷ *Secretary for Justice v Ho Yan Kiu* [2008] HKCA 271.

⁸⁸ *ibid*, [26]. It should be noted that in this case, the facts were not suggestive of consensual 'sexting' offences, but instead, ones involving more obviously exploitative behaviours concerning much younger children.

was made of any exceptions to the sentencing tariff for young people who engage in this conduct with each other.⁸⁹

While it is clear that the PCPO applies to young people, there is little information available on whether young people are being prosecuted in Hong Kong under the PCPO. Overseas there is evidence that this is the case. In Florida, USA, in 2007, a 17-year-old boy was found guilty of possessing child pornography when he took digital images which showed him and his 16-year-old girlfriend engaging in sexual intercourse.⁹⁰ Additionally, they were found guilty of producing a representation which they knew included sexual conduct of a child.⁹¹ A more recent example in the US concerns a 16-year-old ‘high school star quarterback’, Cormega Copening and his 16-year-old girlfriend in North Carolina in 2016.⁹² Police located the images as a result of a search of Copening’s home in an unrelated matter, upon which they discovered that the couple had sent nude photographs of themselves to each other. Initially, both were charged with various offences including possession of child pornography. Eventually, both pleaded guilty to an offence criminalising minors sending and receiving sexually explicit photos and were placed on one year’s probation, thus avoiding detention and placement on a sex offenders’ register.⁹³ According to Strasburger, Zimmerman, Temple and Madigan 23 states still prosecute young people under child pornography statutes where they engage in sexting with other young people.⁹⁴

In Australia, it appears that most cases of consensual sexting do not lead to prosecution under child pornography offences, but rather young people are diverted from formal proceedings. For example, in Queensland, between 2006-2007 to 2015-16, 1470 young people under 17-years-old were either cautioned by the police or diverted into a court conferencing system, for what appear to be in many instances sexting type offences falling within the aegis of child exploitation material offences.⁹⁵

⁸⁹ *ibid*, [4].

⁹⁰ *AH v State of Florida*, 949 So 2d 234 (Fla 1st Dist 2007; 2007 Fla App LEXIS 484). Offence under § 827.071(2), Florida Statutes (2005).

⁹¹ Florida Statutes (2005) § 827.071(5).

⁹² Kimberly W O’Connor and others, ‘Sexting Legislation in the United States and Abroad: A Call for Unity’ (2017) 11(2) *International Journal of Cyber Criminology* 218, 219.

⁹³ *ibid* 219.

⁹⁴ Strasburger, Zimmerman, Temple and Madigan (n 13) 5.

⁹⁵ Queensland Sentencing Advisory Council, *Sentencing Spotlight Child Exploitation Material Offences* (2017) <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0010/519535/Sentencing-Spotlight-on-child-exploitation-offences.pdf> accessed 24 August 2020.

In the United Kingdom, advice in the form of a protocol exists for schools to deal with sexting incidents concerning students which come to their attention.⁹⁶ A key feature of this advice is that schools have discretion to deal with incidents rather than referring them to the police if those involved are not aged below 13, no adults are involved, there was no coercion and no aggravating circumstances, such as widespread non-consensual dissemination.⁹⁷ Quoting from the UK Council for Child Internet Safety, ‘If a young person has shared imagery consensually, or as a joke, and there is no intended malice, it is usual appropriate for the school to manage the incident directly’.⁹⁸ In other cases the matter will be referred to police.⁹⁹

Where a matter has been referred to the police, absent the types of aggravating circumstance like coercion or exploitation, then to prevent, where possible, children being criminalized,¹⁰⁰ police have substantial discretion as to how to proceed with a report of sexting.¹⁰¹ Although underage sexting complaints need to be recorded by the police,¹⁰² depending on the circumstances, they could be dealt with as ‘Outcome 21’ which states that ‘further investigation, resulting from the crime report, which could provide further evidence sufficient to support formal action being taken against the suspect is not in the public interest’.¹⁰³ In 2014/2015, of a reported 6238 offences to police of ‘children sharing or possessing sexual images of themselves or others’,¹⁰⁴ 2079 cases were categorized as Outcome 21, 63 young people received charges and the remaining 4,096

⁹⁶ UK Council for Child Internet Safety, *Sexting in Schools and Colleges: Responding to Incidents and Safeguarding Young People* (2016) <<https://www.safeguardingschools.co.uk/wp-content/uploads/2016/08/Sexting-in-schools-and-colleges-UKCCIS-August-2016.pdf>> accessed on 27 July 2020.

⁹⁷ *ibid*, 14.

⁹⁸ In such cases schools may take disciplinary action, *ibid*, 15.

⁹⁹ *ibid*, 14.

¹⁰⁰ Gavin Hales, The Police Foundation. *Perspectives on Policing: Paper 4. A Sexting Surge or a Conceptual Muddle? The Challenges of Analogue Law and Ambiguous Crime Recording* (31 January 2018) 5 <http://www.police-foundation.org.uk/2017/wp-content/uploads/2010/10/perspectives_on_policing_sexting_FINAL.pdf> accessed 24 August 2020.

¹⁰¹ *ibid*, 6-7

¹⁰² *ibid*, 3-5.

¹⁰³ *ibid*, 6. Problematically, from a rehabilitation perspective, the reporting of a sexting allegation, even if disposed of under Outcome 21, could remain in existence as a police record until the subject reaches 100 years of age, and requested by a potential employer in the interim; see *R (CL) & The Chief Constable of Greater Manchester Police and The Secretary of State for the Home Department* [2018] EWHC 3333 (Admin).

¹⁰⁴ *ibid*, 7 referring to National Police Chiefs’ Council (NPCC) (2017) *Police Dealing with Rising Number ‘Sexting’ Cases Involving Children. Press Release*, 6 November 2017 <<https://news.npcc.police.uk/releases/policeresponding-proportionately-to-rising-number-of-sextingincidents>> accessed 27 July 2020.

offences were not further pursued, for reasons such as victims not wanting the case to proceed or a lack of sufficient evidence.¹⁰⁵

Although to date, there is little information available in this regard in Hong Kong, the lack of reports of prosecutions suggests that the approach in Hong Kong is similar to Australia and the UK, where seemingly police and prosecutors are not engaged in widespread prosecution of young people engaged in sexting. Rather, it appears likely that young people are diverted from prosecution under the Police Superintendent's Discretion Scheme, which has been operating in Hong Kong since 1963.¹⁰⁶ Under this scheme a person under 18 can be cautioned and placed under police supervision rather than being prosecuted, where they voluntarily and unequivocally admit the offence, there is sufficient evidence to prosecute and the parents or guardians agree to the caution.¹⁰⁷

B. Risks of no barriers to prosecution of children

While it seems that there is no appetite to subject young people to prosecution under the PCPO where they engage in sexting behaviours in Hong Kong the examples from other countries, particularly from the US, demonstrate that there is a danger that these offences can be utilised. Unless protections are put in place prosecutorial practice and policy can easily change and young people could be subjected to prosecution. An example of a recent change in police practice in Hong Kong that could increase the likelihood of young people being apprehended for sexting behaviours relates to actions in accessing, through search warrants, the mobile phones of 3,721 people arrested between June and November 2019 during the period of social unrest.¹⁰⁸ The ability of police to search phones has supposedly been facilitated by new software allowing criminal investigators to circumvent security features in mobile devices and access data.¹⁰⁹ This could mean that images

¹⁰⁵ *ibid.*

¹⁰⁶ Hong Kong Law Reform Commission, *Review of Substantive Sexual offences (Report 2019)* [3.54]. For brief details on the scheme see <https://www.police.gov.hk/ppp_en/13_faqs/faq_cri.html> accessed 24 August 2020.

¹⁰⁷ Other matters considered are the nature, seriousness and prevalence of the offence, the offenders past criminal records and the attitude of the complainant.

¹⁰⁸ Question by the Hon Charles Peter Mok and a Reply by the Secretary for Security, Mr John Lee, in the Legislative Council (8 January 2020) The Government of the Hong Kong Special Administrative Region, Press Releases <<https://www.info.gov.hk/gia/general/202001/08/P2020010800640.htm>> accessed 24 June 2020.

¹⁰⁹ John Power, 'Hong Kong protests: did police use Israel's Cellebrite hacking tech to crack protesters' smartphones?' *South China Morning Post* (22 January 2020) <<https://www.scmp.com/week-asia/politics/article/3047164/hong-kong-protests-did-police-use-israels-cellebrite-hacking>> accessed 24 February 2021.

that could fall within the definition of child pornography and have been stored on mobiles phones could be accessed by police.

Further compounding this concern is the recent decision of *Sham Wing Kan v Commissioner of Police*,¹¹⁰ which provides a more permissive regime for the warrantless seizure and search of mobile phones incidental to an arrest. In this case the Court of Appeal took the view that the principles governing the power to search a mobile phone and its contents are governed by the common law, rather than the stricter requirements of s. 50(6) Police Force Ordinance (Cap 232) ('PFO').¹¹¹ It further held that a search of a mobile phone, as with any warrantless search, must satisfy the proportionality test.¹¹² Namely, that, '[t]he set of criteria permitting a warrantless search of digital contents of a mobile phone must serve legitimate interests, rationally connected with such interests and the permitted search should be no more than necessary to accomplish such interests'.¹¹³ While the Court of Final Appeal does apply a number of safeguards, the test is broadly framed and potentially open to various interpretations, depending on the nature of the case.¹¹⁴ In contrast, s. 50(6) PFO only permits police officers to conduct a warrantless search of mobile phones or their digital contents when exigent circumstances arise.¹¹⁵

Adding to apprehensions of police arrests inadvertently leading to further arrests for sexting behaviour, the Court of the First Instance has recently considered the restrictions that need to be imposed on the ambit of search warrants issued by magistrates pursuant to s. 50(7) PFO which relates to the search of a mobile phone of arrested persons.¹¹⁶ The Court held that it is not necessary for magistrates to specify what documents can be searched on such search warrants, even though this will result in officers being permitted to at least scan all the digital contents of the seized phone.¹¹⁷ This means that if there are no other parameters such as key search words limiting the

¹¹⁰ [2020] HKCA 186.

¹¹¹ *Sham Wing Kan v Commissioner of Police* [2020] HKCA 186 [103]. PCO, s 50(6) only permits police officers to conduct a warrantless search of mobile phones or their digital contents when exigent circumstances arise.

¹¹² *Ibid*, [106], [111].

¹¹³ *Ibid*, [107].

¹¹⁴ *HKSAR v Muhammad Riaz Khan* [2012] HKCFA 38 [19].

¹¹⁵ In *Sham Wing Kan v Commissioner of Police* [2017] HKCFI 1899 [64] Au J noted that exigent circumstances are where the police officer may "reasonably suspect" such an urgent search may (a) prevent an imminent threat to safety of the public or police officers, (b) prevent imminent loss or destruction of evidence, and (c) lead to the discovery of evidence in extremely urgent and vulnerable situation'.

¹¹⁶ *Lee Chu Ming, Martin and Others v A Permanent Magistrate, Eastern Magistracy and Another* [2020] HKCFI 2028.

¹¹⁷ *ibid*, [122], [126].

data mining involved in this exercise, then the risks increase that other information might be revealed.¹¹⁸ Therefore, these types of searches have the potential to further ensnare young people in the criminal justice system.

C. The need to barriers to prosecution of young people

It would be only in unusual cases that prosecution of a young person for a child pornography offences would be an appropriate response to sexting. As the Victorian Law Reform Committee comments, ‘child pornography laws were created for the purpose of protecting children from predatory sexual behaviour ... [they] were not designed to capture this [sexting] type of behaviour’.¹¹⁹ Similarly, in Hong Kong, the sole policy determinant behind the enactment of the PCPO was to deter paedophiles.¹²⁰

Young people’s behaviour rarely fits the rationale that led to the creation and strengthening of these offences. Young people engaging in sexting are generally not showing paedophilic tendencies, they are interested in images of ‘people in their own age group, at a similar stage of physiological and psychological development, and with similar interests’.¹²¹ Nonetheless, as Aiken argues:

One of the problems is that sexting is viewed almost exclusively through the lens of child pornography, and while it is true that the images can look very similar, they are different in terms of intent. In one instance, the explicit image taken by a teenage girlfriend and boyfriend is done voluntarily, and at the other end of the spectrum, the image is coerced from a child victim by a criminal sex offender. There needs to be an active review of the law in this area and the creation of a legal classification framework that differentiates between teenage voluntary sexual exploration and criminal generation of child abuse material, the defining criteria being *mens rea*, or intent.¹²²

¹¹⁸ *ibid*, [113].

¹¹⁹ Law Reform Committee (n 1) 73.

¹²⁰ Security Bureau, *Legislative Council Brief. Prevention of Child Pornography Bill SCBR 2/3231/2001* (8 January 2002) <<https://www.hkispa.org.hk/publicpapers/childbill.pdf>> accessed on 27 July 2020.

¹²¹ Law Reform Committee (n 1) 139.

¹²² M Aiken, *The Cyber Effect. A pioneering Cyberpsychologist Explains How Human Behaviour Changes Online* (John Murray 2017), 191.

Further in this regard, the PCPO, and the raft of similar offences in Australia, England and Wales, the USA and elsewhere, were enacted before young people's access to smart phones became widespread. They were thus generally enacted without considering the fact that young people could be caught up in such offences for engaging in sexting.¹²³

When sexting is consensual and not exploitative, there should be no need for a criminal law response. Education may be the best way of ensuring that young people are equipped to safely navigate such behaviours and identify when there is exploitation. Sexting between young people which is non-consensual and/or exploitative also does not fit the rationale for criminalising child pornography but it does represent a violation of a young person's privacy, dignity and sexual autonomy. This may require a criminal law response, not in the form of a child pornography offence, but some other offence directed at the actual harm involved.¹²⁴ Proposals for how best to respond to sexting are discussed in the following section.

V. What Should Be Done About Sexting?

A. Restricting the Availability of Child Pornography Offences

Given that young people's engagement in sexting will rarely fit the rationale underlying the child pornography offences and that prosecution can have significant negative impacts on young people's lives, such offences should not apply or only apply in limited circumstances to young people. One way of limiting the reach of the PCPO in cases involving young people sexting would be to enact a provision requiring the permission of the Secretary for Justice or Director of Public Prosecutions before a person under the age of 18 can be prosecuted under the PCPO. Such a provision, requiring permission of the Attorney-General before initiating proceedings against a young person, was included in the Commonwealth Criminal Code Act 1995 in Australia following concerns about the negative impacts of such prosecutions.¹²⁵ This has the advantage of placing

¹²³ Thomas Crofts and Murray Lee, "'Sexting', Children and Child Pornography' (2013) 35 Sydney Law Review 85.

¹²⁴ Here, Gillespie has drawn the distinction between the harm posed by public distribution of the image as compared to the taking and possession of it. In his view, criminalisation of these latter acts is a disproportionate response, see Alisdair Adolescents, 'Sexting and Human Rights' 13(4) Human Rights Law Review (2013) 623-643, 641.

¹²⁵ Explanatory Memorandum to the Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010 (Cth) <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4275_ems_ed3ea591-6390-4a0b-ade0-8cc710287ad7/upload_pdf/339085.pdf;fileType=application%2Fpdf> accessed 24 August 2020.

decisions about whether to prosecute young people at a higher level, thus making them more consistent and easier to review. It would also go some way to protect against overzealous individual prosecutors, but it would not completely prevent prosecution of young people under the PCPO.

A further restriction would be to introduce a defence into the PCPO for young people, as has occurred in a number of Australian and US states. An example is New South Wales where a 2018 amendment to the Crimes Act 1900 provides that a person does not commit the offence of possession of child abuse (pornography) material where the person was under 18 and a reasonable person would consider the possession reasonable. Reasonableness is assessed based on: the content and nature of the material; the manner in which it was produced and how the accused came to possess it; matters such as the child's age, vulnerability and intellectual ability and other matters relating to the child, (who was displayed in the material) as well as in relation to the accused, occurring both when in possession and arrested; and the parties' relationship.¹²⁶ A defence also applies to possession if the accused person is the only person depicted in the image or to producing or disseminating where the accused person is under 18 and the only person depicted in the image.¹²⁷ Notably, this defence does not extend to a person under 18 producing or disseminating images of another person under 18.

While 23 states in the US continue to allow the prosecution of young people under child pornography laws others have either developed defences or exceptions, provided reduced penalties upon conviction¹²⁸ or introduced diversionary programs¹²⁹ (which involve education on the consequences of sexting).¹³⁰ An alternative approach, adopted in 19 states is to provide for a

¹²⁶ Crimes Act 1900 (NSW), s 91HAA. Another example is Tasmania, where it is a defence to certain child exploitation material offences where the material shows sexual activity between the accused and an under 18 year old which is not unlawful, Criminal Code (Tas), s 130E(2). Sexual intercourse with a person under 17 is unlawful, however, consent is a defence if the person is 15 or over and the accused is not more than 5 years older or if the person is 12 or over and the accused is not more than 3 years older, Criminal Code (Tas), s 124.

¹²⁷ Crimes Act 1900 (NSW) s 91HA.

¹²⁸ See, for instance, Utah, Utah Code Ann §76-10-1204.

¹²⁹ See, for instance, New Jersey, NJ Rev Stat §2A:4A-71.1.

¹³⁰ For a summary of the different approaches see Strasburger, Zimmerman, Temple and Madigan (n 13) 4-5.

¹³⁰ Strasburger, Zimmerman, Temple and Madigan (n 13).

separate misdemeanour sexting offence (such approaches are discussed in the following section).¹³¹

In Maine a person does not violate the offence of possession or dissemination of sexually explicit material if the person depicted in the image ‘is 14 or 15 years old and the defendant is less than 5 years older than the person depicted’.¹³² In Nebraska it is an affirmative defence to a charge of possession of a visual depiction of sexually explicit conduct involving a child¹³³ if:

- (a) The visual depiction portrays no person other than the defendant; or
- (b)(i) The defendant was less than nineteen years of age; (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; and (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.¹³⁴

Inserting a defence into the PCPO would acknowledge that generally sexting does not fit the rationale for such offences. It would help ensure that only the most serious cases are prosecuted under the PCPO. Such an approach could be combined with reduced penalties for young people who are convicted under the PCPO. However, reduced penalties alone are insufficient because they do not restrict the availability of child pornography offences. Equally, if diversionary programs are adopted they should be used to divert young people from prosecution rather than provided as an alternative sanction upon conviction. Such programs should also be carefully

¹³¹ See, for example, Texas Penal Code § 43.261. This provision also includes certain defences to the offence.

¹³² Maine, 17-A MRS §§283.1A, 284.1A

¹³³ Nebraska, NRS §28.1463.02.

¹³⁴ Nebraska, NRS §28.813.01.3

designed to educate not just about negative risks involved in sexting but to help foster ‘positive practices for engagement with the online world’.¹³⁵

B. Introducing New Specific Offences

1. Image based abuse offences

In recent years, many jurisdictions have created offences to criminalize the non-consensual distribution of intimate images, or what is colloquially, known as ‘revenge pornography’.¹³⁶ This behaviour is generally associated with adults disseminating intimate images without consent in act of revenge. However, there are many varied situations in which intimate images may be taken, possessed and disseminated and these behaviours are not limited to adults.¹³⁷ Indeed, Victoria, one of the first jurisdictions to enact laws relating to the non-consensual distribution of intimate images, did so following recommendations made by the Law Reform Committee in its inquiry into sexting by young people.¹³⁸ In the US 19 states have also adopted offences to specifically address sexting.¹³⁹

There is considerable variation in how image-based abuse offences are defined, but generally they cover the intentional dissemination of intimate images knowing or believing that the subject of that image did not consent to the distribution. Intimate images generally covers images of a person’s genitals or anal region or breasts (of a female), as well as images of a person engaging in a private act (bathing, using a toilet or engaging in a sexual act) where they would expect privacy. Such offences may also cover threats to non-consensually distribute intimate images and also non-consensual possession.¹⁴⁰ In some jurisdictions, the distribution, possession or threat to distribute

¹³⁵ Murray Lee, Thomas Crofts, Michael Salter, Sanja Milivojevic and Alyce McGovern, ‘Lets’ Get Sexting’: Risk, Power, Sex and Criminalisation in the Moral Domain’ (2013) 2(1) *International Journal of Crime and Justice* 35-49, 45.

¹³⁶ For discussion, see for instance, Tim Gregory, ‘Sexting and the Politics of the Image: When the Invisible Becomes Visible in a Consensus Democracy’ (2015) 2(4) *Porn Studies* 243; Clare McGlynn, Erika Rackley and Ruth Houghton, ‘Beyond “Revenge Porn”: The Continuum of Image-Based Sexual Abuse’ (2017) 25 *Feminist Legal Studies* 25–46; Tyrone Kirchengast and Thomas Crofts, ‘The Legal and Policy Contexts of “Revenge Porn” Criminalisation: The Need for Multiple Approaches’ (2019) 19 *Oxford University Commonwealth Law Journal* 1-29.

¹³⁷ As noted above the research of McGeeney and Hanson (n 32) 12 found that motivations for sexting include pressure from friend or partner and getting back at someone, alongside having fun and flirting etc.

¹³⁸ Law Reform Committee (n 1).

¹³⁹ See for instance North Dakota, NDCC §12.1-17-07.2; Texas Penal Code § 43.261; for discussion see Strasburger, Zimmerman, Temple and Madigan (n 13).

¹⁴⁰ For example, Crimes Act 1900 (NSW), s 91R(1); Penal Code (Singapore), s 377BE(2).

must be done with the intention or belief that this will cause alarm, humiliation or distress to the subject of the image.¹⁴¹

In Hong Kong there are currently no offences to specifically deal with the non-consensual observation, recording or dissemination of intimate images. In April 2019 The Law Reform Commission of Hong Kong released a report which recommended offences to criminalize voyeurism and upskirt-photography.¹⁴² A report published by the Security Bureau in January 2021 notes that the Government accepts the recommendations of the Commission and also proposes to introduce offences to cover the non-consensual photography of intimate parts.¹⁴³

The offences recommended by the Law Reform Commission in 2019 are based on s 67 and s 67A of the Sexual Offences Act 2003 (E&W).¹⁴⁴ Voyeurism would cover observing or recording, for sexual gratification, a person engaged in a private act where they have an expectation of privacy. Upskirting would criminalize the operation of equipment for observing or recording a person's genitals or buttocks (or underwear covering the person's genitals or buttocks), where these would not normally be visible, but without requiring an expectation of privacy.¹⁴⁵ The offence requires that the perpetrator acts without the consent of the person and without reasonably believing that the person consents. An aggravated form of the offence would apply where the person's conduct is for the purpose of obtaining sexual gratification or humiliating, alarming or distressing the person.¹⁴⁶

The additional offences proposed by the Security Bureau would cover observing or recording an intimate act regardless of the purpose ('intimate prying'), distribution of images obtained through

¹⁴¹ For example, Penal Code (Singapore), s 377BD, BE; or that actual emotional distress or harm is caused, see North Dakota, NDCC §12.1-17-07.2.

¹⁴² Law Reform Commission of Hong Kong, *Voyeurism and Non-consensual Upskirt-photography, Report* (n 9). For discussion of the need to criminalize a broader range of offences in Hong Kong see T Crofts, 'Criminalization of Voyeurism and "Upskirt Photography" in Hong Kong: The Need for a Coherent Approach to Image-Based Abuse' (2020) Chinese Journal of Comparative Law 1-33, doi:10.1093/cjcl/cxaa031.

¹⁴³ Security Bureau (n 11) [1.07-1.08].

¹⁴⁴ In its 2012 Consultation Paper the Commission had initially proposed that the offence of sexual assault be extended to cover behaviour of a sexual nature which caused the victim "fear, degradation or harm", including upskirt photography, Law Reform Commission of Hong Kong, *Rape and Other Non-Consensual Sexual offences* (Consultation Paper 2012) [6.30]. However, in its 2019 Report the Commission noted that this proposal did not receive community support, Law Reform Commission of Hong Kong, *Voyeurism and Non-Consensual Upskirt-Photography* (n 9) [42].

¹⁴⁵ This offence is based on s 67A Sexual Offences Act 2003 (E&W), which was introduced through the Voyeurism (Offences) (No. 2) Act 2019.

¹⁴⁶ Law Reform Commission of Hong Kong, *Voyeurism and Non-Consensual Upskirt-Photography* (n 9) [63].

voyeurism, ‘upskirt photography’ or ‘intimate prying’ and the non-consensual distribution of intimate images which were previously taken with consent.¹⁴⁷

The advantage of such offences is that they address the core harm caused by such behaviours; that is the violation of the person’s privacy, dignity and sexual autonomy by observing, recording and sharing of intimate images without consent. In relation to sexting by young people, these offences would be a better alternative to child pornography offences, which do not accurately reflect the harm associated with sexting, nor the motivations for sexting. Furthermore, these offences focus on whether the behaviour occurs without the consent of the person, and as such, they are not directed at consensual sexting.

While the case for these offences is compelling a concern is that they could lead increased numbers of young people being brought into the criminal justice system. Currently, it seems that police and prosecutors are reluctant to commence criminal proceedings against young people because child pornography offences are seen as inappropriate or overly harsh. However, this reticence may lessen if new offences designed specifically to cover recording and sharing of intimate images are introduced.

If such offences are introduced it is hoped that police would continue to divert young people under the Police Superintendents’ Discretion Scheme. However, while such discretionary schemes may be very useful¹⁴⁸ they may ‘not provide a great deal of certainty or transparency to young people’.¹⁴⁹ Discretion is, of course, an essential element of most criminal justice systems. However, its exercise without clear guidance leaves the prosecution of young people potentially open to political and cultural caprice.¹⁵⁰ Transparent prosecutorial guidelines indicating the basis upon which prosecution should proceed might ‘militate against any perceived possibilities of (using a phrase coined by Bibas) “idiosyncratic” prosecutorial discretion’.¹⁵¹ Such guidelines should make

¹⁴⁷ Security Bureau (n 11) [1.08].

¹⁴⁸ It is also acknowledged that even diversionary schemes can have negative impacts on young people.

¹⁴⁹ Kelly Tallon, Ahran Choi, Matthew Keeley, Julianne Elliott and Debra Maher, ‘New Voices/New Laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour’, (National Children’s and Youth Law Centre and Legal Aid NSW 2012), 9
<http://www.lawstuff.org.au/__data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf> accessed 24 August 2020.

¹⁵⁰ Richard Ericson, ‘Police as Reproducers of Order’, in Tim Newburn (ed) *Policing: Key readings* (Willan 2005), 215.

¹⁵¹ David Birchall and Jack Burke, ‘Just a Slap on the Wrist? Parental Corporal Punishment of Children and the Defence of Reasonable Chastisement in Hong Kong’ (2020) 50 *Hong Kong Law Journal* 167, 190, 191, referring to

clear when prosecution is in the public interest and clarify that criminal offences should be reserved for more egregious forms of behaviour, such as where there is no consent, particularly in cases involving exploitation or coercion.

2. *Causing a child to view a sexual image*

In another report published in December 2019 the Hong Kong Law Reform Commission proposed two new offences which could also have an impact on sexting by young people.¹⁵² Based on offences in Scotland,¹⁵³ the Commission recommended the introduction of the offence of causing an under 13-year-old to look at a sexual image (including texts and audio messages) where this is done to obtain sexual gratification, humiliate, distress the child or any combination of these purposes. A separate offence would cover causing a child under 16 to look at a sexual image.¹⁵⁴

The Commission recommended that criminal liability for the commission of these proposed offences should apply to all persons. However, while the Scottish offence of causing an under 13-year-old to look at a sexual image has no specific aged-based statutory defence,¹⁵⁵ the s 33 offence, relating to older children (those aged 13 to 16), only applies to offenders aged 16 or over.¹⁵⁶

Another important difference between the Scottish provision and the recommendations in the Commission's December 2019 report is the existence of a defence to proceedings under s 33 SOA,

Stephanos Bibas who argued that: 'Rules should be clear, general, stable, announced in advance, applied prospectively and consistently, and capable of being followed', see 'The Need for Prosecutorial Discretion' (2010) Faculty Scholarship Repository, Paper 1427, 369, 375, 371 <available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2428&context=faculty_scholarship> accessed 24 August 2022). The Law Reform Commission of Hong Kong has also commented on the desirability of guidelines for the exercise of prosecutorial discretion in relation to the criminal liability of young people for engaging in sexual acts with other young people, *Review of Substantive Sexual Offences* (n 10) [3.54].

¹⁵² The Law Reform Commission of Hong Kong, Report. *Review of Substantive Sexual Offences* (n 10). See also, similar recommendations earlier in The Law Reform Commission of Hong Kong, *Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016) [7.77], [7.83] and Recommendation 13 <https://www.hkreform.gov.hk/en/docs/sexoffchild_e.pdf> accessed on 29 July 2020.

¹⁵³ Sexual Offences (Scotland) Act 2009 ('SOA')

¹⁵⁴ The Law Reform Commission of Hong Kong, Report. *Review of Substantive Sexual Offences* (n 10) [3.89]-[3.96], see also *Final Recommendation* 14 [3.96].

¹⁵⁵ SOA, s 23.

¹⁵⁶ SOA, s 33; see also Scottish Parliamentary Corporate Body, *Sexual Offences (Scotland Bill). Policy Memorandum* (2008) [107]

<[https://www.parliament.scot/S3_Bills/Sexual%20Offences%20\(Scotland\)%20Bill/b11s3-intro-pm.pdf](https://www.parliament.scot/S3_Bills/Sexual%20Offences%20(Scotland)%20Bill/b11s3-intro-pm.pdf)> accessed on 30 July 2020; Scottish Children's Reporter Administration, *Practice Direction 31 Sexual Offences (Scotland) Act. Appendices* (25 April 2018) 48-49 <<http://www.scra.gov.uk/wp-content/uploads/2018/04/Practice-Direction-31-Sexual-Offences-Scotland-Act-2009-Appendices.pdf>> accessed 24 August 2020.

‘if the difference between the accused’s and that of the older child did not exceed 2 years’.¹⁵⁷ This defence was seen to operate as a proportionately protective recognition of the realities of teenage relationships.¹⁵⁸ This is largely reflective of the manner with which Scotland approaches consensual sexual relationships (short of sexual intercourse) between young people:

Touching, kissing and sexual conversations are considered by most people to be a normal part of growing up as a teenager. The Scottish Government does not propose that the law should interfere with this type of activity between two young people aged 13 to 15 so long as both parties consent to this activity.¹⁵⁹

In an earlier and broader discussion about taking a ‘lighter touch’, through the use of a general prosecutorial discretion not to prosecute consensual sexual and non-exploitative offences between those aged between 13 and under 16,¹⁶⁰ the Scottish Law Reform Commission wrote:

We are not impressed by the argument that such criminal liability would be theoretical only and in the vast majority of cases there would be no criminal prosecutions. Such an approach fails to take account of the possibility that older children might still be subject to investigation by the police, even if prosecution in the criminal courts is unlikely.¹⁶¹

This viewpoint stands in contrast to the position adopted in the Commission’s December 2019 report, which notes that, ‘all consensual sexual activity between persons who are between 13 and 16 years of age should be criminalized but recognising that prosecutorial discretion will be exercised as to whether a case is appropriate for a charge to be brought’.¹⁶² This is because there can be no assumption that sexual relations are fully consensual just because the children are close in age.¹⁶³ Furthermore, the Commission felt that: ‘The fact that young people do engage in sexual activity is not a proper grounds for legalising the activity and giving them any form of encouragement to do so. The law should set parameters for young people's behaviour’.¹⁶⁴

¹⁵⁷ SOA, ss 39(3), 39(4)(d).

¹⁵⁸ Scottish Parliamentary Corporate Body (n 204) [125]-[126].

¹⁵⁹ *ibid*, [113].

¹⁶⁰ Scottish Law Reform Commission, *Report on Rape and Other Sexual Offences* (December 2007) [4.55] <available at <http://www.scotlawcom.gov.uk/files/4712/7989/6877/rep209.pdf>> accessed on 30 July 2020.

¹⁶¹ *ibid*.

¹⁶² *ibid*, [3.45], Recommendation 8 [3.55].

¹⁶³ *ibid*, [3.51].

¹⁶⁴ *ibid*, [3.53].

Rather than create any exceptions the Commission felt that prosecutorial discretion will ensure that only ‘appropriate’ matters will be taken to court¹⁶⁵ or addressed under the Police Superintendents’ Discretion Scheme.¹⁶⁶ In the absence of supporting defences to sexual offences for similarly aged young people, the Commission does make a welcome point that prosecutorial guidelines should be developed in relation to older children,¹⁶⁷ as there will be instances where it may not be acceptable to automatically absolve older children from all criminal responsibility. For instance, where the sexting is coercive or exploitative. However, the creation of new specific offences which could cover sexting, including ones relating to explicit messages by older children, may increase interventions by the criminal justice system, even if they do not result in a prosecution or a conviction.

In developing new criminal offences it should be kept in mind that criminal law may not always be the most appropriate way to respond to sexting behaviours by young people. A report by Justice in England and Wales has expressed concern about prosecuting young people for some sexual offences, noting that not only may this lead to undue criminalisation of young people but it affects their future life chances, which can increase the risk of recidivism.¹⁶⁸ In particular, Justice notes that the ‘sexting phenomenon’ has driven up the volume of child offences and prosecution is sucking up large resources that could be better spent on education.¹⁶⁹

C. Non-Legal Responses

1. Education

Education is the key to ensuring that young people are given the tools to deal with their developing sexuality and to safely negotiate dealing with others. At the moment, however, it is not mandatory

¹⁶⁵ In the UK Baroness Noakes expressed concern about rely on prosecutorial in discretion in cases of sexual offending involving young people, Lords Hansard, 2 June 2003; Col 1104:

‘It continues to trouble me that we must rest on prosecutorial discretion in determining which sexual activities are to be treated as criminal....We should remember also that while child offences include full sexual intercourse, they extend to a lot of other activities such as kissing, heavy petting and looking at dirty magazines. I wonder if there are any children under 16 who do not engage in one or more of those activities.’

¹⁶⁶ *ibid*, [3.54].

¹⁶⁷ *ibid*, [3.54].

¹⁶⁸ Justice, *Prosecuting Sexual Offences. A Report by Justice* (2019) [5.78] <<https://justice.org.uk/wp-content/uploads/2019/06/Prosecuting-Sexual-Offences-Report.pdf>> accessed 30 July 2020.

¹⁶⁹ *ibid*.

in HK for schools to provide comprehensive sex education to students.¹⁷⁰ Currently, the Government relies on ‘guidelines’ that leave schools substantial discretion as to what they teach about sex education.¹⁷¹ Although some of the topics mentioned in these guidelines could cover sexting, it is not specifically mentioned as an area to be covered.¹⁷²

It would be preferable, and consistent with current policy,¹⁷³ for schools to engage in comprehensive sex education which addresses topical issues, including sexting, in a holistic way. As Leung comments comprehensive sex education,

‘is an empowerment-based rooted with values and practices emphasizing human rights, gender equality, participative learning, youth advocacy and civic engagements, as well as cultural appropriateness. It aims to equip students with knowledge, values/attitudes, and skills to facilitate students to make informed decisions that promote sexual health’.¹⁷⁴

Conducted effectively, aside from informing students about the potential negative impacts consequent upon engaging in such a behaviour, it might also help them understand why they might be motivated at this stage of their life to do so.¹⁷⁵

Furthermore, in relation to the nuances of both the hazards of sexting and the underlying reasons for it, curriculum design in relation to sexting could take into account the somewhat seemingly different attitudes and effects of sexting between males and females, as reported in a study by

¹⁷⁰ Justice Center Hong Kong, *Joint Civil Society Submission from the Hong Kong UPR Coalition* (March 2018) Attachment B Sexuality Education [72] <https://www.justicecentre.org.hk/framework/uploads/2019/09/HKUPRC_Submission_MARCH2018.pdf> accessed 24 August 2020.

¹⁷¹ Research Office. Legislative Council Secretariat, *Information Note. Sexuality Education* INO3/17-18, [1.5] <<https://www.gov.hk>>1718in03-sexuality-education-20180109-e> accessed 6 January 2020.

¹⁷² *ibid*, [2.2], [3.3] and [3.5]-[3.6], Appendixes I-IV at 22-32.

¹⁷³ Quoting from The Government of the Hong Kong Special Administrative Region, Press Releases, *LCQ10: Promoting Positive and Healthy Sex Attitudes Among Youngsters* (26 April 2017) relating to a question by the Hon Cheung Kwok-kwan and a written reply by the Acting Secretary for Education, Mr Kevin Yeung at [5]: ‘In response to the rapid societal changes and needs of students, the EDB will continue to strengthen support to schools, such as ongoing development of learning and teaching resources, renewal of relevant curricula’ <<https://www.info.gov.hk.gia.general.201704>26.P2017042600626>> accessed 24 August 2020.

¹⁷⁴ Hildie Leung, Daniel Shek, Edvina Leung, and Esther Shek ‘Development of Contextually-relevant sexuality Education: lessons from a Comprehensive Review of Adolescent Sexuality Education Across cultures’ (2019) 16(4) *International Journal of Environmental Res Public Health* 621 [1.4].

¹⁷⁵ Aiken (n 159) 190-192. For further recommendations on how educational leaders should develop policies to educate students, parents and staff about the impacts of sexting see Charles Russo, Allan Osbourne and Kelli Arndt, ‘Cyberbullying and Sexting: Recommendations for School Policy’ (2011) 269 *Education Law Reporter* 427.

Liong and Cheng published in 2017.¹⁷⁶ The results of this study indicated that young males were more likely to sext than young women,¹⁷⁷ and in this regard, to have a more positive attitude toward sexting.¹⁷⁸ Following on from these results, and the danger to young women of both prosecution under child pornography law and greater risk of reputational damage than young men may face from sexting, Liong and Cheng have concluded that, ‘youth service professionals should educate and guide youngsters to exercise their own sexual agency, to think through the possible consequences of sexting and the ways to tackle them, and to respect others’ sexual subjectivity’.¹⁷⁹ While tuition on matters of female empowerment as to their sexual agency are likely to be beyond the likely presently acceptable scope of a school curriculum in Hong Kong,¹⁸⁰ the remaining suggestions, arguably constitute less controversial practical advice.

Education campaigns should be embedded in a holistic broader approach to education about cybersafety that focuses on ‘developing positive practices for engagement with the online world’.¹⁸¹ Such campaigns should avoid focusing on only negative stories about the impact of sexting because this does not accord with the majority of young people’s experiences.¹⁸² Furthermore, as the Expert Group on Preventing Sexual Offending Involving Children and Young People cautions:

Behaviour change and social norms theory suggests that trying to shock people with daunting figures about the scale of a problem can also fail or backfire simply because of the suggestion that the unwanted behaviour is commonplace. This means that the behaviour is perceived as being more normal and less wrong, and also acts as a “magnet”, whereby people are more likely to decide to engage in that behaviour.¹⁸³

¹⁷⁶ Mario Long and Grand H L Cheng, ‘Sext and Gender: Examining Gender Effects on Sexting Based on the Theory of Planned Behaviour’ (2017) 36(7) *Behaviour and Information Technology* 726-736.

¹⁷⁷ *ibid.*, 730.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*, 733

¹⁸⁰ See Hildie Leung and Li Linn, “‘Adult Sexual Risk Behaviour in Hong Kong’ Prevalence, Protective Factors, and Sex Education Programs’ (2019) 64 *Journal of Adolescent Health* 552-558, 557 in which the authors stress the need to use a culturally appropriate curriculum in order for it to be an effective educational tool and their contention that Hong Kong is still a relatively conservative jurisdiction as far as the discussion of liberal sexual mores are concerned.

¹⁸¹ Law Reform Committee (n 1) 53. See also Lee, Crofts, Salter, Milivojevic and McGovern (n179) 45.

¹⁸² Crofts et al (n 22).

¹⁸³ Scottish Government, *The Expert Group on Preventing Sexual Offending Involving Children and Young People, Prevention of and Responses to Harmful Sexual Behaviour by Children and Young People* (January 2020), 64 (reference omitted) < file:///C:/Users/lwpub/Downloads/expert-group-preventing-sexual-offending-involving-

The Expert Group recommends that a ‘social marketing approach’ which uses ‘[s]ocial media and traditional methods of sharing messages (on public transport, TV, radio programmes and newspapers) and providing advice on where to access further information (and support)’ be adopted.¹⁸⁴ The establishment of a Children’s Commission in 2018 in Hong Kong will hopefully attract the input of younger people to better inform policy makers on how to develop educational materials that speak to young people’s experience.¹⁸⁵

2. Administrative measures

Alongside legal and educational measures a range of administrative approaches should be adopted to address sexting. Social media and mobile providers can be encouraged to be swifter and more diligent in enforcing the terms of their contracts, which usually allow for suspension or termination where services are used for illegal or offensive behaviour.¹⁸⁶ The UK Government supported such voluntary initiatives on the basis that ‘government alone cannot keep citizens safe from online harms’ therefore it ‘sought to work in close partnership with industry to put in place specific technical solutions to make social media platforms safer’.¹⁸⁷ While noting that voluntary initiatives have led to promising results in some areas and some companies ‘have taken a number of steps to improve their platforms’¹⁸⁸ voluntary measures alone were found not to be adequate.¹⁸⁹ The UK Government notes that:

‘At present many online companies rely on using their terms and conditions as the basis by which to judge complaints. In practice however, companies’ terms and conditions are often difficult for users to understand, and safety policies are not consistent across different platforms, with take-down times, description of harms and reporting processes varying’.¹⁹⁰

children-young-people-prevention-responses-harmful-sexual-behaviour-children-young-people%20(1).pdf> (accessed 24 February 2021).

¹⁸⁴ *ibid*, 65-66.

¹⁸⁵ Labour and Welfare Bureau. The Government of the Hong Kong Special Administrative Region, *Commission on Children. Terms of Reference* [4] <<https://www.lwb.gov.hk/en/advisory/coc.html>> accessed 24 August 2020.

¹⁸⁶ Law Reform Committee (n 1) [7.3.1].

¹⁸⁷ Home Office, Online Harms White Paper, Consultation Paper (12 February 2020) [2.9] <<https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper>> accessed 24 August 2020.

¹⁸⁸ *ibid*, [2.10].

¹⁸⁹ *ibid*, [2.15].

¹⁹⁰ *ibid*, [2.13].

The British Government therefore recommends new regulatory approaches to tackle online harms be developed.¹⁹¹ One such alternative regulatory approach is that adopted in Australia where the office of the eSafety Commissioner was established in 2015. Alongside providing educational and training resources, the Office of the-Safety Commissioner has a complaints process for dealing with abusive and illegal online content. The Office will investigate such content and can assist with its removal from social media.¹⁹² The creation of such an office in Hong Kong to protect the online safety of all people in Hong Kong would be a positive step.

VI. Conclusion

Research in many countries has shown that sexting practices are relatively common among young people and this has become a reality of young people's lives. While sexting may have negative impacts on young people, it can also be a positive part of a young person's exploration of their sexuality. Despite this mixed picture, legal responses have tended to focus on the potential negative impacts of sexting and in some jurisdictions young people have been prosecuted under child pornography laws. While it appears in Hong Kong that young people are being diverted from formal proceedings for sexting behaviours rather than being prosecuted under the PCPO there is potential for prosecutorial practice to change.

However, given that sexting by young people rarely fits the rationale behind child pornography offences, especially when engaged in consensually, and that prosecution for such offences is an overly harsh and inappropriate response to sexting barriers to such prosecution should be developed in Hong Kong. This could mean requiring the permission of the Secretary of Justice before allowing prosecution against a young person to be initiated and/or introducing a defence into the PCPO for young people. Under this approach, prosecution would be reserved only for the most egregious cases.

¹⁹¹ *ibid*, [2.16].

¹⁹² Commonwealth Parliament of Australia, The Senate Legal and Constitutional Affairs Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/Report> accessed 24 February 2021.

New alternative offences might also be considered more appropriate to tackle non-consensual sexting, this could include offences considered by the Law Reform Commission of Hong Kong and the Security Bureau. Here, there is the danger of net-widening because these offences might be seen as being developed specifically to facilitate prosecution of sexting behaviours. However, such prosecution should be reserved for cases where the sexting is non-consensual, particularly where there is coercion or abuse. The development of prosecutorial guidelines could help ensure that prosecutions only occur in such cases and that generally young people are diverted from formal proceedings under the Police Superintendent's Discretion Scheme.

It should also be recognized that a criminal response to sexting can have a negative impact on a young person which may outweigh the negative impact of the behaviour the law is seeking to address. Therefore, there should not only be a reliance on criminal law as a means of addressing sexting behaviours and ensuring the online safety of young people. Young people live increasingly in an online world and it is important to help them to negotiate that world as safely as possible through appropriate educational measures and providing alternative avenues for investigating and dealing with online abusive behaviours.