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Sexting, Consent and Young People: Regulatory Challenges

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Introduction

Sexting¹ among young people is a form of peer-based sexual behaviour which has attracted significant social and legal attention. Data varies significantly on the prevalence of the sexual behaviour among young people. Most studies estimate between 15-40% of young people engage in sexting.²

As with most data associated with harmful behaviours, in particular harmful sexual behaviours, the actual figure is often higher e.g. unreported cases. In the case of peer-based sexting behaviours, this may include cases where the young person does not recognise themselves as a 'victim.'

While figures vary, it is clear that sexting among young people is a recurrent behaviour raised within social and legal policies and is impacting enough young people to cause concern among child protection and welfare professionals.³

In spite of growing concerns, 'appropriate' and 'consistent' social and legal interventions are still lacking. Further, despite the complexity of sexting cases and the range of motivations and experiences young people are presenting with, the sexual behaviour is often conceptualised as 'harmful' and/or 'abusive.'

Consequently, in the absence of a clear response, sexting among young people (under 18) is unlawful sexual behaviour and a young person can be prosecuted for a sexual offence.

Drawing from empirical research undertaken as part of an ESRC post-doctoral fellowship, which included semi-structured interviews with key professionals in the public and private sector in Northern Ireland, this paper examines some of the concerns faced by professionals when conceptualising and responding to certain sexting behaviours as either 'explorative' or 'harmful.'

Finally, in light of project findings, the paper offers a number of regulatory recommendations in responding to a sexual behaviour which has become somewhat 'normalised' within youth culture.

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Methodological Design

To address the complexity of the research a mixed methods approach was adopted which included:

1. A comprehensive and multi-disciplinary critical literature review;
2. Semi-structured interviews with 10 professionals who have significant experience in working with young people and/or responding to harmful sexual behaviour (HSB); and
3. A survey completed by 55 young people (aged between 15-18 years) on their understanding of certain sexual behaviours and issues of consent.

For the purposes of this paper, I will focus on professional interviews and the regulatory challenges faced by key workers. All participants were selected using 'purposeful sampling' - a sampling criterion based on the knowledge and experience needed to fulfil the research aims and objectives. All participants participated under guarantees of strict anonymity and confidentiality.

Sexting and Existing Legal Challenges

Of key concern is the severe legal ramifications that can befall a young person who engages in sexting behaviour. While 'sexting' is not a codified offence, the behaviour falls under sexual offence legislation and can result in a young person receiving a caution or conviction.⁴ Consequently, the long-term consequences of sexting are potentially catastrophic and can inhibit a young person's future travel, education and employment opportunities.

Interrelated and significantly, the disparity in legal age limits makes differentiating between 'consensual' and 'non-consensual' sexting behaviours problematic. A young person under 18 cannot legally consent to possessing, creating and/or sharing a naked or semi-naked image of themselves **but** they can legally consent to sexual intercourse at 16. Further, and to complicate things somewhat, the police have a discretionary power to divert cases away from the PPS in cases involving:

- (i) 13 - 15-year olds who have 'consensually' engaged in sexual intercourse;⁵ (ii) there is a small age gap between the parties (typically more than 2 years is considered to be concerning);⁶ and (iii) there is no evidence of coercive or manipulative behaviours.⁷

This discretionary power seems to have translated over to some cases involving young people under 18 and sexting

behaviour.⁸ Yet, with discretionary powers comes a certain level of uncertainty and a lack of consistency in approach and application. Given the severity of having a sexual offence or caution on record, this is disconcerting.

Empirical Findings

A number of concerns were revealed during the course of my research in relation to the emerging nature of the sexual behaviour and regulatory challenges:

1. **The normalisation of a sexual practice within youth culture** which can lead to extremely problematic and harmful outcomes. Speaking with some professionals, it is clear that young people can receive numerous 'sexts' in one day:

*"Some young people that I would speak to would say, 'yeah, yeah I get about 15 d*** pics a day.'"*

This constant bombardment of unwanted sexual imagery/content illustrates that young people are experiencing growing levels of on-line sexual harassment. Yet, due to the normalisation of the sexual behaviour young people often do not recognise the behaviour as 'harmful.'

2. The normalisation of the sexual behaviour is also influencing young people's exposure to a range of **prevalent and often subtle forms of peer pressure**. One professional noted an example of a young girl who was sent an unwanted sexual image and when she challenged the behaviour the sender responded with:

"I'm only having a laugh, and you're not even able to have a laugh. What's wrong with you? If you were any fun you would send one back."

Professionals explained how this 'banter' or 'it's only a joke' mentality increases young people's vulnerability to engage in a sexual behaviour they were previously reluctant to or had previously rejected:

"Am I a bit of a prude? Maybe I am no fun."

3. This in turn, leads to **blurred boundaries between 'consensual' and 'coercive' sexting practices**. Most professionals identified the complex relationship between: (i) the **range of sexual practices** young people are engaging in, including sexting; (ii) the **normalisation** of some of these practices within youth culture; and (iii) **identifying coerce and manipulation** within relationships.

One professional explained how some young people are being controlled and coerced into participating in certain sexual behaviours but are not recognising themselves as 'victims':

"That situation you were in that you ended up having sex with two older males and she would say, 'I know but I got a bottle of vodka out of it and that's what I wanted. So really, I'm the winner.'"

4. In tandem, professionals also identified difficulties young people face in **negotiating 'free and informed' consent** within relationships. Two main issues arose: (i) understanding that a person can **withdraw consent**; and (ii) recognising that **consent is ongoing**. That being that a person can consent to certain forms of sexual behaviour e.g. receiving/sending a sexual image, but not to others e.g. sexual intercourse. For example, one professional explained:

"The young person essentially goes and finds themselves suddenly in a scenario where sex or a sex act is expected, and they feel like well I've implied consent by coming here. Because I've already implied consent I have to follow through with it."

5. Further, **the powerful influence of family life/dynamics** on a young person's ability to understand key concepts such as 'consent,' 'healthy relationships' and identifying potentially 'harmful' and 'toxic' relationship traits became evident:

"They can come home and see a relationship that is quite toxic, and quite dysfunctional, and that will have a greater message to that young person than the half an hour they've learnt in school on what consent is."

Indeed, a number of professionals expressed concern that not enough was being done to challenge unhealthy and threatening behaviours which may be existing in the home.

6. Finally, **the limitations of criminal law**. Three core limitations were noted: (i) the law fails to 'consistently' and 'appropriately' respond to sexting behaviours displayed by young people; (ii) the law does not account for the complexity of the sexual behaviour - sexting can range from 'explorative' to more 'harmful' and potentially 'abusive' sexual behaviour; and (iii) the law was not

designed to criminalise peer-based sexting behaviours and its application within this context is problematic. One professional explained:

"We're criminalising children unnecessarily by virtue of a legislation that was designed 30 years ago for a particular purpose. It is currently not fit for purpose."

Moving Forward

In light of current findings, I have made four concrete recommendations:

- 1. The current legal framework 'is not fit for purpose' and needs to change.** Legislators must recognise that the current laws governing indecent images of children is not a suitable offence to charge peer-based sexting behaviour. The current law fails to account for the range of motivations and experiences young people are presenting with.
- 2. More concise regulatory guidance for practitioners/professionals.** Those who work with young people in any capacity (including within educational settings) require further guidance detailing what key factors identify a sexting case as 'serious' and thus require a level of legal intervention. Not only would this help practitioners and professionals more clearly and readily identify 'harmful' and 'abusive' sexting behaviours, but it would also provide a consistent response framework and prevent young people from unnecessarily being prosecuted or entering the legal system.
- 3. A dedicated awareness campaign on 'withdrawing consent.'** A range of campaigns have been released over the past few years on consent e.g. 'Consent is Everything.' It is clear that an updated campaign which is directed towards young people specifically on 'withdrawing consent' and emerging peer-based sexual behaviours e.g. sexting, is required.
- 4. Comprehensive education programmes in schools for young people and parents/guardians/carers.** Young people need to learn about 'healthy' and 'unhealthy' sexual behaviours, including how to identify 'toxic' and 'unhealthy' relationship traits. Such programmes would help young people build essential tools to make informed and healthy sexual choices. Further and significantly, considering the prevalent concern surrounding 'toxic' family life, there is a need to incorporate parents/guardians/carers within these programmes.

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Footnotes

1. 'Sexting' is an adult generated term which has evolved in meaning and is often only used when defining certain sexual behaviours among young people (under 18). Generally speaking, 'sexting' defines the sending of sexually explicit messages or imagery (either semi-naked or naked) over an online medium e.g. mobile or laptop/computer.
2. See Ringrose, J., Gill, R., Livingstone, S. and Harvey, L. A Qualitative Study of Children, Young People and 'Sexting': A report prepared for the NSPCC, (London NSPCC, 2012).
3. See Ashurst, L. and McAlinden, AM. 'Young people, peer-to-peer grooming and sexual offending: Understanding and responding to harmful sexual behaviour within a social media society,' *Probation Journal* 2015 62(4) 374-388.
4. See s. 3 Protection of Children (NI) Order 1978 and s. 42 Sexual Offences (NI) Order 2008.
5. Note: In law, a child under 13 years cannot consent to any form of sexual activity.
6. See McAlinden, AM. *Children as 'Risk': Sexual Exploitation and Abuse by Children and Young People*, (Cambridge University Press, 2018).
7. See CPS, *Rape and Sexual Offences – Chapter 7 Key Legislation and Offences*, online at: www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences
8. See PSNI, *Sexting and the Law: A basic guide to help professionals and the public deal with incidents of 'sexting'*, online at: www.psnipolice.uk/contentassets/fae34aff4af6409e9ad393130043ec55/sexting__the_law_leaflet_trifold.pdf

Further Reading

- Agnew, E 'Sexting among Young People: Towards a Gender Sensitive Approach,' *International Journal of Children's Rights* 2021 28(4) DOI: 10.1163/15718182-28040010
- Agnew, E. and McAlinden, AM 'Harmful Sexual Behaviours among Children and Young People On-line: Cultural and Regulatory Challenges.' In Killean, R., Dowds, E. and McAlinden, AM. *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, 2021) in press.
- Agnew, E. 'Teenage Sexting: we're letting Young People down by not talking about it' *The Conversation* December 2018.

Support Services

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